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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC.,
INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION,
NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS,
PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.,
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
and VIDEO SOFTWARE DEALERS ASSOCIATION,
Petitioners,

v.

WILLIAM S. COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997, codified at § 10 U.S.C. § 2489a (the "Act"), bans the sale or rental on Department of Defense property, including through the military exchange system, of some forms of expressive material, but not of other forms, if "the dominant theme of [the material] depicts or describes nudity . . . in a lascivious way." The constitutional questions presented are:

1. Whether military exchanges, which since their inception have been used for the dissemination of constitutionally protected expressive materials based on neutral criteria such as customer demand, are designated public fora, in which the government cannot ban the dissemination of protected speech on the basis of content absent a compelling interest achieved through narrowly tailored means.

2. Whether banning the sale or rental of depictions or descriptions of nudity presented in a lascivious way, but not in ways that are chaste or tasteful, constitutes impermissible discrimination against the viewpoints attributed to and expressed by the producers and distributors of the banned material.

3. Whether the Act irrationally and unreasonably bans some forms of speech but not others, utilizing impermissibly vague terms, in violation of the First and Fifth Amendments.

RULE 14.1(b) AND RULE 29.6 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the court of appeals whose judgment is sought to be reviewed is as follows:

General Media Communications, Inc.
International Periodical Distributors Association
National Association of Recording Merchandisers
Periodical and Book Association of America, Inc.
Recording Industry Association of America, Inc.
Video Software Dealers Association
William J. Perry, in his official capacity
William S. Cohen, in his official capacity
Department of Defense

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

None of the named petitioners has any corporate parent, subsidiary or affiliate which is publicly held. (For this purpose, members of trade associations have not been considered affiliates of such trade associations).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners General Media Communications, Inc., et al., respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The split decision of the court of appeals (Pet. App. 1a-44a) is reported at 131 F.3d 273. The amended opinion of the district court (*id.* 45a-67a) is reported at 952 F. Supp. 1072. The court of appeals' orders denying rehearing and suggestion for rehearing en banc (*id.* 68a-69a), and granting a stay of mandate (*id.* 70a-71a) are not reported.

JURISDICTION

The court of appeals entered its judgment on November 21, 1997, and denied a timely filed petition for rehearing and suggestion for rehearing en banc on February 3, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997, codified at 10 U.S.C. § 2489a, and the Department of Defense Directive-Type Memorandum implementing Section 343 are reproduced in the Pet. App. at 72a-78a.

STATEMENT

Background of the Military Exchange System. The Department of Defense ("DoD") operates an extensive retail system, both within the United States and abroad, serving active and retired military personnel and their dependents. The retail operations range in size from large facilities, such as military base exchanges (which can include shopping centers, malls, home & garden centers, and ware-

houses), to small facilities, such as troop stores and stores aboard ships. Decl. of Stephen Rozzetti ¶ 2 (J.A. 108).[1] The Army and Air Force Exchange Service (AAFES) operates about 10,500 facilities, located in 25 countries; the Navy Exchange Service Command (NEXCOM) operates 114 land-based exchanges in addition to ships' stores; the Marine Corps operates additional exchanges at its installations.[2]

Exchanges exist to provide military personnel and their dependents with access to a variety of "articles and services necessary for their health, comfort, and convenience." DoD Directive No. 1330.9 at 1 (J.A. 114). The system is designed to ensure that military personnel—no matter where located—have a "convenient" place to purchase all the types of materials and services that would be available to the general public. The "Post Exchange System is the substitute for the multitude of shopping locations the average American takes for granted everyday." Decl. of Paul Bucha (J.A. 498). For service members stationed in certain locations abroad and on board some ships, exchanges may be the only place they can obtain American-made materials.

Although exchanges offer military personnel substantial cost savings, material provided through the exchange sys-

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[1] J.A. refers to the Joint Appendix in the Second Circuit. Generally, these retail outlets are separated into "commissaries" and "exchanges." Commissaries essentially serve as grocery stores, and primarily sell uncooked food and household items, such as paper towels. Exchanges operate more like large department stores. They sell goods ranging from appliances to automotive supplies to toys and clothing, and may also sell prepared foods and alcohol. *See* DoD Defense Commissary Agency, Facts about DeCA, http://www.dtic.mil/deca/decafacts.html (visited Mar. 2, 1998). (All Internet citations refer to official government Websites.) Both types of facilities will be referred to as "exchanges."

[2] *See* AAFES Worldwide Locations, http://www.aafes.com/pa/corporate_profile.htm (visited Mar. 2, 1998); NEX-Navy Exchange Service Command, About Us, http://www.navy-nex.com/aboutus/history.html (visited Mar. 2, 1998).

tem is *not subsidized* by the federal government. *See* J.A. 35, 38, 42, 45. Rather, the government generally negotiates to obtain materials at low wholesale rates and then sells to military personnel at retail prices lower than those charged outside the exchange system. *See id.*, J.A. 51. The savings is a non-cash form of indirect pay; exchanges are provided to military personnel in lieu of higher salaries and pensions.[3] The government utilizes the profits generated by exchange sales to finance the exchange system and to fund services and activities for the morale, welfare, and recreation of military personnel, such as libraries, chapels, and child care. Facts About DeCA, *supra* n.1.[4]

DoD maintains exchanges as "incentives to enlistment and reenlistment, helping to maintain morale by (1) making family living expenses more manageable, and (2) by providing familiar products for sale at overseas locations. By encouraging reenlistment, [exchanges] also help maintain acceptable manpower levels of trained, skilled personnel, which reduces the need to train new personnel." *Id.* The military branches describe the "mission, goal, and driving force" of exchanges they run as improving the quality of life for military personnel. *E.g.*, Navy Exchange Service Command, *supra* n.2. Surveys of service members consistently place the exchange system at the top of their most valued non-pay compensations. Facts about DeCA, *supra* n.1.

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[3] DoD estimates that customers save an average of 29.7 percent at commissaries and approximately 20 percent at exchanges. Facts About DeCA, *supra* n.1.

[4] Exchanges are almost 100% self-funded, requiring little, if any, congressionally appropriated money. *See* Meyer Scolnick & Joseph Packer, Evolution of the Army and Air Force Exchange Service, JAG L. Rev. Sept-Oct 1966 at 19 (J.A. 345); AAFES, Corporate Profile, http://www.aafes.com/pa/Corporate_Profile.htm (visited Mar. 2, 1998) (2% of budget is appropriated funds); NEX-Navy Exchange Service Command, *supra*, n.2 (only ships' stores use appropriated funds).

Military exchanges have always served a communicative function. At their inception, in the late 1800's, exchanges were located whenever practicable in the same buildings as the library or reading room. Scolnick and Packer, *supra* n.4 at 27 (J.A. 353). One primary mission of the early exchanges was the provision of "newspapers and magazines" to military personnel. *Id.* at 24, 25 (J.A. 350, 351). This communicative function has continued to this day. Listed among the products exchanges are authorized to provide are "books, manuals, and periodicals." DoD Directive No. 1330.9 at 2-1-3 (J.A. 135). Exchanges thus function, in significant part, as bookstores or newsstands.

Consistent with their mission to be "the primary source of nonsubsistence resale merchandise and services for military personnel on DoD installations," *id.* at 1 (J.A. 114), exchanges have traditionally sold and rented a broad cross-section of privately published expressive material, and have eschewed content-based and viewpoint-based discrimination and moralizing as a basis for selecting the materials offered. Publishers wishing to disseminate information through exchanges are permitted to do so, and military personnel and their families are therefore able to receive such information, as long as certain neutral criteria are met, including demand—both current and measured by past sales—and available shelf space. *See, e.g.,* Navy Resale Manual, Pub. No. 145, Jan. 1989, at 4-16 (J.A. 204).

Applying these neutral criteria, the standards governing exchange resale practices expressly recognize that exchanges will be offering "adult literature, music and video recordings." *Id.* Periodicals such as *Penthouse* and *Playboy* have been available through the exchanges for as long as they have been popular national magazines. Demand for the magazines is high. AAFES has reported that its exchanges sell 12.6 million copies of 219 different "adult" magazines every year out of a total of 57 million maga-

zines of all kinds.[5] In 1995, for example, approximately 220,600 copies of *Penthouse* were sold at military exchanges located in the United States, and another 47,000 copies were sold at exchanges and ships' stores abroad. Aff. of Joseph M. Gallo ¶ 4 (J.A. 42); *see also* Pet. App. 49a & n.4 (*Playboy* sales). Sales of "adult" materials generate considerable profit for the government. It is estimated that in 1995 the exchange system made approximately $459,000 on sales of *Penthouse* alone. Gallo Aff. ¶ 5 (J.A. 42). These profits fund quality-of-life programs for military personnel and their families.

Background of the Act. In early 1996, three Congressmen—Representatives Robert Dornan (R-Cal.), Christopher Smith (R-N.J.) and Roscoe Bartlett (R-Md.)—introduced a bill, which they called the Military Honor and Decency Act, that would ban the distribution of "adult" material in military exchanges. The bill was eventually enacted, without any title, as Section 343 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. No. 104-201, 110 Stat. 2422) (codified at 10 U.S.C. § 2489a) (the "Act"). No hearings were held regarding the Act, and no committee reports were issued.

DoD played no part in the drafting or enactment of the Act. DoD did not request or support the Act. Indeed, when DoD's opinion regarding such a ban had been sought in the past, it stated that such a ban "would raise serious constitutional and administrative problems."[6] The military did *not* contend that the Act was necessary to support the military's ability to carry out its mission, or to maintain loyalty, discipline, or morale in the armed forces. In fact, there is no evidence in the legislative history or

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[5] Guy Gugliotta and Bradley Grahm, *Off-the-Shelf Defense Policy*, Wash. Post, May 8, 1996, at A3.

[6] Memorandum for Director, Personnel Administration and Services, Office of the Ass't Secy. of Defense, from H. Lawrence Garrett, III (Gen. Counsel of the DoD), re: "Adult-Oriented" Magazines in Military Exchanges, dated Sept. 18, 1996, reprinted in Supplemental Appendix ("S.A.") submitted in the Second Circuit, at 5-7.

elsewhere that the Act was enacted in response to any military concern or problem.

Although the Act contains no express purpose, its sponsors made clear their intent. Congressman Dornan stated:

> This garbage, this direct assault on my mother, who has long gone to heaven, my wife who is very much alive, my sisters-in-law, my aunt who is alive in her 90's and my three daughters and five granddaughters and maybe a sixth granddaughter on the way.
>
> Pornography is a frontal, direct, vicious, specific assault upon women. It treats them—well, some homosexual pornography is a direct assault upon boys or young men or ephebes—young men 18, 19, 20—just barely over the age in most States of maturity. Most pornography is a direct assault on women, cheapening [them] down like slavery to a product, meat on a rack.
>
> [M]acho guys . . . think demeaning women by buying this garbage is manly, and it is not. . . . Some [exchange] managers with guts, practicing Protestants and Christians and observant Jews who work in the PX system saying, Hey, this is enough. . . . I want to junk it anyway. . . . That helps commanders to take that, not puritanical, but strong, manly decent line.

142 Cong. Rec. H8822, H8824 (July 30, 1996). This sentiment was echoed by other sponsors. *E.g.*, Robert Cohen, *New Military Enemy: Hustler and Playboy Amendment Can Ban Sales on U.S. Bases*, Star-Ledger, May 2, 1996, at 3 (quoting Rep. Bartlett during markup as stating "This is smut. This is demeaning to women and it leads to aberrant behavior."). Because DoD's views were not solicited and there were no hearings, the sponsors also mistakenly believed the government *subsidizes* materials offered through exchanges, and that banning adult materials was necessary to stop their subsidization. *See* Bartlett Press Release, May 1, 1996; Bartlett Press Release, Sept. 18, 1996 (S.A. 3). Nowhere in the sponsor's com-

ments was there any indication that they viewed the Act as necessary to or supportive of the military function.

The Act and Its Operation. The Act contains two independent statutory prohibitions, neither of which was requested or supported by the military. The first bans "the sale or rental of sexually explicit material on [DoD] property" (10 U.S.C. § 2489a(a)); the second forbids "[a] member of the armed forces or a civilian officer or employee of the [DoD] acting in an official capacity" to "provide for sale, remuneration, or rental sexually explicit material to another person" (10 U.S.C. § 2489a(b)). *See* Pet. App. 72a.

The Act defines affected DoD property to include commissaries, military exchanges, and ships' stores. *See* 10 U.S.C. § 2489a(d)(2); Pet. App. 72a-73a. Sexually explicit material is defined as meaning *only* "an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d)(1). *See* Pet. App. 72a. On the eve of the Act's effective date, DoD issued a "Directive-Type Memorandum" implementing the Act. It defined "dominant theme" as "[a] theme of any material that is superior in power, influence, and importance to all other themes in the material combined," and "lascivious" as "[l]ewd and intended or designed to elicit a sexual response." Pet. App. 76a.[7]

By its terms, the Act does *not* ban books, computer programs, or periodicals without visual depictions, regard-

[7] It is far from clear precisely what is banned. Unlike other laws, the Act does not require lascivious exhibition of the genitals. It merely requires lascivious descriptions or depictions of "nudity," and nudity is not defined. What it means to depict or describe *nudity* in a lascivious manner is not self-evident. Apparently, a photo or written description of a bare-breasted woman would be sufficient to trigger the ban if the depiction or description was deemed to be lewd and designed to elicit a sexual response.

less of their content. Consequently, a book containing lascivious descriptions (or depictions) of nudity is not banned, but an audio recording of the very same book is banned. Similarly, a periodical containing lascivious descriptions of nudity, but no visual images, is not banned; but the addition of visual depictions—even if not sexually oriented—results in banning the same periodical. Although "periodicals" can be banned, a one-time or special issue publication is not banned, even if it contains nothing but lascivious descriptions or depictions of nudity. Moreover, a periodical containing lascivious depictions of nudity will not be banned if those depictions are not the "dominant theme" of the periodical. Thus, the Act does not, by any means, ban all materials containing depictions or descriptions of "nudity . . . in a lascivious way." Finally, the Act does not ban the possession or non-commercial distribution on military property of lascivious descriptions or depictions of nudity, or of any other non-obscene sexually explicit material. Military personnel are permitted to purchase those materials off-base and to bring them on military property, or to obtain them through the mail.

The DoD Directive mandates the establishment of a "Resale Activities Board of Review," whose responsibility entails reviewing material offered or to be offered for sale or rental through exchanges and determining whether the material is banned under the Act. Pet. App. 77a. Once it is determined that the Act bans certain material, the material is withdrawn from all exchanges and cannot be purchased absent subsequent permission by the Board. *Id.* As applied to periodicals, this process will necessarily result in banning *future* issues based on the Board's judgment regarding the content of earlier issues.

Proceedings Below. Before the Act became effective, petitioners (publishers and distributors of materials at risk of being banned, *see* Pet. App. 6a), brought a facial challenge, alleging that the Act violates the First and Fifth Amendments. After petitioners filed a motion for prelimi-

nary injunction, the district court issued a temporary restraining order enjoining enforcement of the Act until the motion was resolved. After oral argument, the parties agreed to treat the motion as one for permanent injunction. *See id.*

The district court permanently enjoined enforcement of the Act, concluding that it violated both the First and Fifth Amendments. Without reaching the issue whether military exchanges are public or nonpublic fora, the court concluded that the Act violates the First Amendment on the ground that it bans protected speech because the government "finds the ideas, messages or perspectives expressed therein to be offensive, vulgar or indecent." Pet. App. 61a. The court rejected the government's post-hoc argument, advanced during litigation and supported by nothing in the statutory text or legislative history, that Congress intended the Act to promote military "core values" and to prevent public perception that the military endorses the material sold. The court noted, first, that the Act does not prohibit the possession or non-commercial distribution of sexually explicit material on military property, and there was no evidence that sale (versus possession) causes the alleged harm to the military's core values. *Id.* 60a. The court also observed that it was unreasonable to equate the sale or rental of sexually explicit material in exchanges with official "endorsement," as exchanges offer all kinds of harmful products that are popularly demanded by military personnel, such as alcohol and tobacco. *Id.* Rather, the court concluded, "a plain reading of the Act leads inevitably to the conclusion that it was drafted in an attempt to limit the sale and rental of non-obscene speech that Congress believed to be offensive and to penalize those who publish it by preventing its sale to military exchanges." *Id.*

The district court also held that the Act violates the equal protection component of the Fifth Amendment. The court concluded that "[b]y treating one form of publishing ideas differently than another, the Act invites strict

scrutiny," and found no evidence to suggest that this distinction was necessary to achieve the alleged goal of promoting "core values." *Id.* 63a-64a. Finally, the court held the Act void for vagueness because the subjective term "lascivious" invites *ad hoc* decisions that will inevitably chill protected speech. *Id.* 64a-67a.

A divided panel of the Second Circuit reversed. The majority concluded that the Act does not violate the First Amendment because military exchanges are nonpublic fora, the Act is not viewpoint-based, and the Act is reasonable in light of the purpose of the forum. The majority's forum analysis was grounded in its conclusion that military *bases* are created to prepare military personnel for combat, and "[t]he exchanges themselves are in no way *public*," *id.* 12a; further, the government is merely acting as proprietor. *Id.* The majority recognized that, even in a nonpublic forum, the government cannot restrict expressive activity based on the viewpoints expressed. *Id.* 13a. But the majority ruled that the Act's ban on material containing nudity presented in a "lascivious manner" did not constitute viewpoint-based discrimination. *Id.* 17a. Further, relying solely on the government's post-hoc justifications for law, and being "far more deferential" than when reviewing regulations impinging the First Amendment rights of civilians, *id.*, the majority concluded that the Act's ban is reasonable because it "promotes military honor, professionalism, proper decorum, and military 'core values,'" *id.* 20a, by "distancing the military from a perceived endorsement of these materials." *Id.* 22a.

Subjecting the Act's distinctions between different forms of expression only to rational basis analysis, and citing no evidence whatsoever, the majority opined that "Congress could rationally have concluded that exchanges do not trade extensively in books containing sexually explicit material . . . [and] that visual forms of lascivious expression are more prevalent, more likely to be noticed, or more

provocative than written materials." Pet. App. 23a.[8] The majority also concluded that the Act afforded sufficient clarity, because it is not a criminal statute and because greater vagueness should be tolerated in the military context. *Id* 24a-27a.

Judge Parker, in dissent, did not reach the forum issue because he would have held that the Act constitutes impermissible viewpoint discrimination. By banning only depictions of nudity that are "lascivious," Judge Parker concluded, "the government is necessarily attempting to regulate a specific perspective"—namely, "that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination." *Id.* 33a. Judge Parker explained, "[b]y restricting the sale of depictions which some viewers find offensive and others titillating, the government favors and protects the viewpoint of those offended and restrict[s] the viewpoint of those who are titillated." *Id.* 34a. Judge Parker concluded that the Act could not even satisfy intermediate First Amendment scrutiny, refusing to accept the government's "unsubstantiated post-hoc rationalization" (*id.* 40a): not only is there "no evidence that th[e] 'risk' of perceived official endorsement is real, it defies common sense." *Id.* 42a.

After denying a timely petition for rehearing and suggestion for rehearing *en banc*, Pet. App. 68a-69a, the court of appeals stayed issuance of its mandate. *Id.* 70a-72a.

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[8] The majority offered no rationale for why an audio recording of a book could be banned while the printed version was not; or why lascivious descriptions of nudity in a periodical with non-sexual visual images are banned while the same periodical with no images is not; or why a one-time publication, no matter how lascivious its content, would not be banned.

REASONS FOR GRANTING THE PETITION

The Court's review this Term of the decisions in *Arkansas Educ. Tel. Comm'n v. Forbes*, No. 96-779, and *National Endowment for the Arts v. Finley*, No. 97-371, demonstrates the importance of the public forum and viewpoint issues presented here. The decision below conflicts with this Court's precedents and with rulings of other courts of appeals. It also reflects continuing confusion regarding what constitutes a designated public forum, and what constitutes viewpoint-based discrimination, and this case presents a good vehicle for resolving that confusion. Moreover, the majority's decision is flatly wrong, and will result in massive restriction of the First Amendment rights of our country's military personnel and their dependents.

I. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER GOVERNMENT PROPERTY IS A DESIGNATED PUBLIC FORUM CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED.

Like so many important First Amendment cases, this case arises in the context of an attempt by the government to regulate sexually oriented speech. But this case is not merely about such speech. It raises the fundamental question whether the government may restrict military personnel's access to speech of *any* content. The rule adopted by the court of appeals allows such content-based bans. The court found that any military property is a nonpublic forum, unless the military has "abandoned" the property to the general public. Thus, the court found, the military could preclude service members' access, through the exchange system, to constitutionally protected material, so long as the restriction is merely reasonable and the government can articulate a legitimate concern. The court's conclusion—that Congress' alleged desire not to have the military be "associated" with a particular type of speech is a legitimate ground for banning the sale of that speech

—is not limited to sexually oriented expression. Under the court's reasoning, the government would be free to restrict service members' access to, for example, information regarding race, abortion, or AIDS.

The impact of the decision below will be wide-ranging and severe. There are roughly 1.4 million active duty members of the armed services.[9] They and their dependents rely on exchanges to provide them with "convenient" and inexpensive access to expressive materials. Indeed, for the ten percent of active duty personnel stationed on board ships or submarines, and the sixteen percent stationed abroad from Antarctica to Zimbabwe, exchanges may represent the *only* source of English language expressive materials.[10]

This case thus fundamentally differs from those cases holding that members of the general public typically cannot gain access to military bases in order to distribute leaflets or make speeches, *e.g., Greer v. Spock*, 424 U.S. 828 (1976), and those cases upholding the proscription of speech that presents a clear danger to military loyalty, discipline, or morale. *See Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974). The majority below upheld a ban on speech from areas *specifically set aside for the dissemination of speech—exchange newsstands and bookstores*—simply because Congress was offended by that speech. In upholding this ban, the majority ignored this Court's precedent and lower court decisions applying that precedent.

In a series of cases, this Court has set out the test for determining whether government facilities are public fora. Such facilities may be public fora by tradition (such as public parks and streets) or by designation. The latter category is at issue here. A "designated" public forum is

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[9] *See* DoD, Active Duty Military Personnel Strengths by Regional Area and by Country (309A), September 30, 1997 (prepared by: Washington Headquarters Services Directorate for Information Operations and Reports).

[10] *See* DoD 309A Report, *supra* n.9; Bucha Aff. (J.A. 497).

property the "State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). Examples of designated public fora are university meeting facilities, *Widmar v. Vincent*, 454 U.S. 263 (1981); school board meetings, *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); municipal theaters, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); and a candidates' debate for a particular Congressional seat, sponsored by and broadcast on public television, *Forbes v. Arkansas Educ. Tel. Comm'n*, 93 F.3d 497 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997). Both "traditional" and "designated" public fora are subject to stringent First Amendment constraints. In either type of forum, the government may *not* impose "content-based" restrictions on expressive activity unless it can demonstrate a "compelling state interest . . . that is narrowly drawn [to achieve that end]." *Perry Educ. Ass'n*, 460 U.S. at 45.

In determining whether a designated public forum has been created, courts must first define the relevant property. In doing so, the focus must be on "the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). Thus, if a speaker sought general access to the entirety of particular government property, the inquiry would focus on the property as a whole. If, however, a speaker seeks access to only a portion of the property, the inquiry must focus on that portion. *Id.* Courts must then consider whether government intended to open *that portion* of its property to expressive activities. *See id.* at 802; *Perry*, 460 U.S. at 45-46. The government's assertions regarding its intent are not, however, accepted blindly. Instead, courts look first "to the policy and practice of the government" with respect to the underlying property, and then "examine[] the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. This inquiry is required to guard "against the dangers of post-hoc policy formulation. . . . The government may not 'create'

a policy to implement its newly-discovered desire to suppress a particular message." *Air Line Pilots Ass'n Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995).

The court below generally acknowledged these tests, but did not apply them. In this case, speakers and listeners sought to distribute and receive expressive material only through *exchanges*. Thus, the court was required to examine exchanges alone—those portions of military property that offer access to magazines, newspapers, and books. *See Flower v. United States*, 407 U.S. 197 (1972) (road running through military base is a public forum, although the base itself is not); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985) (cable television access to military bases may be designated public fora, even though bases themselves are not); *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (chapels on military bases are public fora, even though base itself is not).[11] Ignoring those rulings of this Court and other courts, the court below focused not on exchanges but on the military's practices with regard to entire *bases*, and relied on cases holding that bases themselves are not public fora. Pet. App. 10a (*citing Greer v. Spock, supra*; *United States v. Albertini*, 472 U.S. 675 (1985)). It emphasized that it is "the business of a military installation . . . to train soldiers, not provide a public forum." *Id.* 10a (internal quotation omitted). This conclusion is simply beside the point.

The court of appeals also rested its decision in large part on the misapprehension that military bases (or portions thereof) cannot be designated public fora unless they have been "abandoned." Pet. App. 13a. No other

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[11] *See also Forbes*, 93 F.3d at 503 (where plaintiff sought access to candidates' debate, relevant forum is such debate, not television channel's entire programming); *Airline Pilots Ass'n*, 45 F.3d at 1151-1152 (where plaintiff sought access to advertising display cases in airline terminal, relevant forum was display cases, not entire terminal).

court has held that portions of a military base cannot be designated public fora unless the government has "abandoned" all claims to exclude civilians. Although abandonment is one way to establish that a public forum has been created, *see Flower v. United States, supra*, there is no "special test for military bases. . . . In all cases, whether military bases are involved or not, the test is simply whether the government intended to open up the facility . . . ." *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991); *see also Rigdon, supra* (finding that chapels on military bases are designated public fora, even though the government had not abandoned all claims to exclude civilians from those chapels).

The court's "abandonment" test led it to rely, erroneously, on the fact that "exchanges themselves are in no way *public*." Pet. App. 12a. Instead, the court emphasized, only "military personnel, their dependents, orphans, surviving spouses, and certain other affiliated personnel" have access to exchanges. *Id.* These limitations, the court found, serve as an "indicator that the government did not intend to dedicate exchanges to expression and discourse," because "a limited audience would necessarily hinder, rather than further, the opportunities for communication by speakers such as [petitioners]." *Id.*

That analysis is flatly at odds with this Court's holdings that a designated public forum need not be opened to the public at large, or for all expressive activity, but may be created for use by a particular group, or for a particular purpose. *See, e.g. Widmar v. Vincent, supra* (student groups); *City of Madison Joint Sch. Dist., supra* (school board business).[12] In *Widmar*, as here, government facilities were not opened for use by the public at large. None-

[12] Some courts have classified public fora designated for specific uses as "limited public fora," a subcategory of designated public fora. *See, e.g., Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688 (2d Cir. 1991) (school auditorium is "at least" a limited public forum); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (public library is a limited public forum for the purpose of access to information).

theless, this Court held that "[t]hrough its policy of accommodating their meetings, the University has created a forum," albeit a forum designated for use by students only. *Widmar*, 454 U.S. at 268. The court below failed to apply this principle. Had it done so, it would have been forced to conclude that through its policy of opening exchanges for expressive activities, the government created a public forum, albeit a forum designated for use by military personnel and their dependents only.

The court also relied on the irrelevant fact that because of physical space limitations, not all speakers who wish to speak through exchanges can be accommodated. Pet. App. 12a. But as this Court's precedents make clear, the use of neutral criteria to decide who can speak is perfectly consistent with the concept of a designated public forum. The question is not whether the government property is open to *all* speakers, but whether it has been opened to any speakers who satisfy neutral criteria. *See Widmer, supra*; *Madison Joint Sch. Dist., supra.* Here, the evidence submitted by the government itself demonstrated that military exchanges have historically been open to all lawful speech that satisfies neutral criteria such as customer demand and available shelf space. *See, e.g.*, AAFES Special Retail Programs EOP 40-11, 10-2(a) (November, 1994) (J.A. 164) (directing that decisions be made based on customer demand, shelf space, and price); *see also* S.A. 5 (DoD memo, *supra* n.6, noting same). In holding there was no intent to create a designated public forum because not all books and magazines are carried in every exchange, the court below ignored this evidence, and failed to follow *Widmar* and its progeny.

Finally, the court ignored clear precedent when it held that "because military exchanges are 'engaged in commerce,' their operation is generally inconsistent with the creation of a public forum." Pet. App. 12a. As this Court has made clear, even when the government is acting as proprietor, the "restrictions that the government seeks to place on the use of its property" must be analyzed using a "forum based" approach. *See International Soc'y*

for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); *see also United States v. Kokinda*, 497 U.S. 720, 726 (1990) (noting that, since its decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), which employed a "proprietor" test, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes" (citation omitted)).[13]

Because the court of appeals misapplied this Court's test for determining whether government property is a designated public forum, and thus erroneously concluded that military exchanges are not, it did not subject the Act to the strict scrutiny designated public fora require. *See Perry*, 460 U.S. at 46. Had it done so, the Act would have been struck down; the government did not even attempt to argue that the content-based ban satisfies strict scrutiny.

Ironically, finding that exchanges are not designated public fora *creates* the "endorsement" problem the government purports to be concerned about. The Act's content-based ban of some but not all sexually explicit material will necessarily give rise to the inference that the government *does* endorse the sexually explicit material it has not banned. By contrast, if exchanges are properly recognized to be designated public fora, the government could not be perceived as endorsing any given material, because speech in such a forum is *public* speech, not government speech. DoD could easily post notices reflecting the position announced in its regulations that it "does not

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[13] In any event, although the military may be acting as a proprietor, the military did not adopt the ban at issue in this case. Congress did, and it did so not in its role as proprietor, but in its role as lawmaker—dictating what is appropriate for military stores to carry based on the content, and purported viewpoint, of the material sold. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (distinguishing between the government acting as proprietor and as lawmaker).

have the right to remove adult-oriented reading material from sale unless the materials have been judged to be obscene by a state or federal court." AAFES Special Retail Programs EOP, at 10-2(e)(1) (J.A. 165); *see also* Pet. App. 42a (Parker, J., dissenting) (DoD could post "non-endorsement" signs). If exchanges are held to be designated public fora, military consumers will recognize that all constitutionally protected information for which there is demand is made available in exchanges, regardless of whether the military approves of any given publication's content.

II. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER A REGULATION OF SPEECH IS VIEWPOINT-BASED CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED.

This case requires review for a second reason. By holding that the ban on petitioners' speech was not viewpoint-based, and was therefore permissible, the majority ignored this Court's precedents and created irreconcilable tension with the correct decisions of several other Circuits. Even in a nonpublic forum the government may not permit some speech and exclude other speech of the same type based on viewpoint. *See Cornelius,* 473 U.S. at 811; *see also Perry,* 460 U.S. at 46. In the Act, Congress discriminated based on viewpoint in two ways: it deliberately sought to advance its own viewpoint by suppressing what it perceived as petitioners' contrary viewpoint; and it suppressed petitioners' actual viewpoint on a range of subject matter including sexuality, gender roles, and morality.

Animus against petitioners and similarly situated speakers motivated the Act. Congress did not ban all depictions of nudity; rather, it banned only certain forms of expression that "depict[] or describe[] nudity . . . in a lascivious way." 10 U.S.C. § 2489a(d)(1). The Act permits any depiction of nudity that is deemed chaste, artistic, or scientific, and therefore not "demeaning." This distinc-

tion reflects Congress' clear intent, borne out by the legislative history, to impose its own view of morality on service members and their dependents.

Every justification offered for the Act in Congress and in this litigation entails viewpoint discrimination. In a floor speech, Rep. Dornan, the principal sponsor, said his bill should be enacted to promote "decent" speech, because "[p]ornography is a frontal, direct, vicious specific assault upon women . . . cheapening [them] down like slavery to a product, meat on a rack." 142 Cong. Rec. H8822, H8824 (July 30, 1996). The bill's sponsors openly sought to suppress what they saw as the undesirable viewpoints of periodical publishers that include nude images in their publications, expressly naming *Penthouse* and *Playboy*. *Id.* The sponsors characterized magazines that publish nude photographs as "garbage," *id.* (Rep. Dornan), and "demeaning to women," Gugliotta & Grahm, *supra* n.5, at 3 (quoting Rep. Bartlett during markup of bill). The majority simply dismissed these expressions of congressional intent. *See* Pet. App. 19a n.13.

In defending the Act, government counsel advanced, and the majority approved, two different but equally viewpoint-based rationales—that the Act was necessary to "promote[] military honor, professionalism, proper decorum, and military 'core values,' " *id.* 20a, and "to disassociat[e] the military from [petitioners'] speech," *id.* 15a n.10, in order to avoid "sending a message that military approves of or endorses" that speech. *Id.* 19a. Accordingly, the court approved a scheme whereby a nude image is proscribable only if it expresses a viewpoint that, in Congress' eyes, offends military "core values" or threatens to taint the military by association.

Even apart from the absence of *any* evidence that the *military* thought the Act was necessary or helpful to promote "core values," a regulation designed to promote core values is necessarily viewpoint-based, and thus unconstitutional. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can pre-

scribe what shall be orthodox in . . . matters of opinion. . . ." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The government may have some latitude to promote values to military personnel, a lesser corollary of the latitude public schools have to "transmit community values" to their students. *Cf. Board of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion).[14] Neither institution, however, may promote its preferred values by squelching viewpoints it deems inconsistent with those values. As *Pico* noted, if respondents "intended by their removal decision to deny . . . access to ideas with which [respondents] disagreed, and if this intent was the decisive factor in [respondents'] decision, then [respondents] have exercised their discretion in violation of the Constitution." *Id.* at 871 (footnote omitted); *see also Barnette*, 319 U.S. at 637; *cf. Texas v. Johnson*, 491 U.S. 397, 418 (1989) ("To say that the government has an interest in encouraging proper treatment of the flag . . . is not to say that it may criminally punish a person for burning a flag as a means of political protest."). Banning descriptions and depictions perceived as "demeaning" to women, or as inconsistent with "core values," plainly violates this prohibition. *See American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (striking down ordinance banning sexually oriented material depicting women in "subordinate" manner); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (Library

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[14] The majority below relied on *Pico*, 457 U.S. at 871, and on *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), for its fallacious conclusion that "a distinction based on lasciviousness is viewpoint neutral." Pet. App. 16a-17a. That reliance was misplaced. *Pico* presented no issue of viewpoint discrimination on grounds of "lasciviousness," and the speaker in *Fraser* appears not to have argued viewpoint discrimination at all. In addition, both *Pico* and *Fraser* involved primary public schoolchildren, a population that presents very different problems and involves very different governmental interests than do the soldiers and sailors at issue here. *See Fraser*, 478 U.S. at 682-83 (distinguishing adults' expressive rights from children's lesser rights).

of Congress' ban of braille edition of *Playboy* is unconstitutional viewpoint-based discrimination); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (government could not "prohibit only that commercial advertising that depicts men in a demeaning fashion").[15]

The majority failed even to examine the government's manufactured post-hoc "core values" and "endorsement" rationales in assessing whether the Act discriminated based on viewpoint. This Court has made clear that reviewing courts must critically examine the justifications governments offer for arguably viewpoint-based restrictions on speech. Indeed, the asserted justifications for challenged laws frequently have been cited as the best evidence of their discriminatory purposes. *See R.A.V.*, 505 U.S. at 393; *Texas v. Johnson*, 491 U.S. at 411; *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688-89 (1959). As in those cases, the justifications offered in support of the Act confirm the impermissible discriminatory purpose behind it.

The narrow category of speakers penalized by the Act also confirms Congress' discriminatory animus. The Act carefully targets a specific segment of the print medium: only "a periodical with visual depictions" is barred from exchanges. 10 U.S.C. § 2489a(d)(1).[16] The effect of the

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[15] The majority below misread *R.A.V.* In *R.A.V.*, this Court stated in dicta that, within a class of *unprotected* speech, government could discriminate based on the same characteristics that caused the speech to be unprotected. *See* 505 U.S. at 388. Because this Court's example of that principle was discrimination based on "prurience" within the class of obscenity, *see id.*, the majority below concluded that, even as to *protected* speech, "prurience and patent offensiveness are . . . permissible grounds on which to discriminate." Pet. App. 16a. The Court's extension of the *R.A.V.* dictum to protected speech cannot withstand scrutiny.

[16] For example, Madonna's book *Sex*, which contains numerous nude images and would undoubtedly be deemed "lascivious" if printed in a periodical, can be sold at exchanges, as can Henry Miller's *Tropic of Cancer*.

Act's precisely crafted proscription is to single out the small class of publishers who sell "periodical" publications which contain nude images. In fact, the Act's sponsors singled out some of those publications by name. *See supra* p. 20.

This Court has inferred discriminatory animus from similar attacks on narrow segments of the print media. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana applied a special tax to publications that accepted advertising and had a weekly circulation of more than 20,000 copies, thereby burdening only a small group of publishers. *Id.* at 240-241. In striking down the tax, this Court emphasized that the narrow range of speakers affected strongly implied a discriminatory intent. The tax was "measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a *selected group* of newspapers." *Id.* at 251 (emphasis added). *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), held that discriminatory taxation of a small segment of the print media violated the First Amendment even absent discriminatory animus, *see id.* at 591-92 (see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-29 (1987)), but it left no doubt that disparate treatment burdening a selected group of publishers is strong evidence of discriminatory intent.

In this case, the narrow range of publishers affected by the Act reflects Congress' discriminatory animus. Congress would have served more effectively any of the constitutionally infirm justifications offered for the Act—banning material that "demeans" women, disassociating the military from potentially "offensive" material, or promoting military "core values"—by casting the Act's net to encompass printed matter beyond periodicals and content beyond "lascivious" depictions of "nudity." The Act's narrow compass confirms what the government's justifications for the Act establish: Congress' purpose in passing the

Act was to suppress ideas it did not like that were likely to be expressed by speakers it did not like. *See Arkansas Writers' Project*, 481 U.S. at 229-30.

Besides intentionally discriminating against a viewpoint Congress *imputed* to petitioners, the Act effectively discriminates against petitioners' *actual* viewpoint: the perspective on sexuality, gender roles, and morality expressed by petitioners and other speakers blacklisted by the Act. The court below characterized the Act as merely discriminating based on "content," not "viewpoint." But two recent decisions of this Court, and numerous appellate cases following those decisions, preclude that analysis.

Twice in recent Terms, this Court has held that the test for "viewpoint-based" discrimination must be broadly construed, in order to prevent the government from imposing a viewpoint-based regulation by mischaracterizing it as content-based. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court overturned a school district ordinance that opened school property for numerous uses but not for religious purposes. The Court held that the district's refusal to allow screening of a religious film about family values amounted to a denial "solely because the film dealt with the subject from a religious standpoint." *Id.* at 394. This Court expanded on *Lamb's Chapel* in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), which involved a university's refusal to subsidize a Christian student publication called *Wide Awake* with funds available to other student publications. The University argued that, because it refused to subsidize any viewpoint on the "subject" of religion, its policy was permissible content discrimination. This Court rejected that argument. While acknowledging that "[r]eligion may be a vast area of inquiry," the Court explained that religion also provides "a specific premise, a perspective, a stand-point from which a variety of subjects may be discussed and considered." *Id.* at 831. The Court concluded that *Wide Awake*'s "prohibited perspective, not the general subject matter, resulted in" the discrimination. *Id.; see also Johnson*, 491 U.S. at 413 & n.9.

Petitioners here, like the speakers in *Lamb's Chapel* and *Rosenberger*, express a particular viewpoint on a variety of subjects, including human sexuality, gender roles, and morality. Magazines such as *Penthouse* deal with sexuality as healthy and enjoyable, and portray women and men as attractive individuals who enjoy their sexuality. They advocate and reflect a tolerant attitude toward sex and sexuality. The subjects on which petitioners express their perspective, no less than the "variety of subjects" at issue in *Rosenberger*, are categories within which government may not discriminate based on viewpoint. The Act, however, singles out petitioners' viewpoint for suppression while permitting contrary viewpoints on the same topics. Under the Act, service members and their families will remain free to purchase magazines like *Ms.*, which criticize notions of sexual freedom as exploitative of women; like *Good Housekeeping*, which perpetuate traditional gender roles; and like the *National Review*, which advocate a socially and morally conservative agenda, including a more restrictive view of the appropriate degree of sexual freedom for men and women. All of those publications, quite properly, will remain available in exchange bookstores and newsstands if enough service members and their families want to buy them. But *Penthouse* and other materials that depict or describe nudity in the course of expressing less traditional viewpoints on sexuality, gender roles, and morality will be banned.

The opinion below, by defining petitioners' perspective on a range of topics as mere "content," clears the way for almost unlimited approval of viewpoint-based censorship in the guise of "content selection." *Lamb's Chapel* and *Rosenberger* require exactly the opposite approach—a broad understanding of "[t]he prohibited perspective, [as opposed to] the general subject matter," *Rosenberger*, 515 U.S. at 831—as a means to prevent viewpoint discrimination. The majority's failure to follow this Court's decisions will deny the First Amendment's expressive liberty to the very people charged with defending it.

The court of appeals' acquiescence in the Act's viewpoint discrimination conflicts sharply with recent decisions of at least six other Circuits. The Ninth Circuit confronted, and this Court is considering a claim very similar to petitioners' in *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997). In *Finley*, several artists challenged a statute that required the NEA, in weighing grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954 (d)(1); *see* 100 F.3d at 674-75. The appellate court held the case indistinguishable from *Rosenberger*:

> Here, too, it is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter—an American flag, for example—could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not.

100 F.3d at 683. Thus, the *Finley* court understood *Rosenberger* to require treating "indecency" and attitudes toward "beliefs and values" as imputed viewpoints, rather than mere subject matter. If the Ninth Circuit was correct, then that dictate of *Rosenberger* also must encompass expressive material "the dominant theme of which depicts or describes nudity . . . in a lascivious way," 10 U.S.C. § 2489a(d)(1), or does not take a "decent line." *Supra*, p. 6.

Indeed, two Circuits have applied this Court's recent decisions to bar discrimination between clashing viewpoints about sexuality and morality. In *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) ("*GLBA*"), a state forbade state universities from funding any organization that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws." Ala. Code § 16-1-28; *see GLBA*, 110 F.3d at 1545. A student organization, denied funding under

the statute, challenged it, and the Eleventh Circuit held that the statute impermissibly discriminated against the organization's viewpoint on the subject of sodomy and sexual misconduct laws. Finding *Rosenberger* "directly on point," *GLBA*, 110 F.3d at 1550, the court explained that the University

> does not prohibit discussion of the sodomy or sexual misconduct laws in general. Rather . . . [t]he statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination.

Id. at 1549. Similarly, in *AIDS Action Comm. v. MBTA*, 42 F.3d 1, 10-12 (1st Cir. 1994), the First Circuit struck down a policy that prohibited condom advertisements in subway cars while permitting R-rated film advertisements that "represent the *conventional* exploitation of women's bodies for commercial advertising," *id.* at 12, because the policy created "at least an appearance of viewpoint discrimination." *Id.* at 12. Both *GLBA* and *AIDS Action* found viewpoint discrimination in enactments that forbade unpopular, arguably indecent expression about sexuality and morality. Faced with an indistinguishable enactment in this case, the court below found only content discrimination.

Courts of appeals have applied *Rosenberger* and *Lamb's Chapel* in both nonreligious and religious contexts to distinguish viewpoint-based discrimination from content-based distinctions, in ways that cannot be squared with the decision below. *See, e.g., Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (*en banc*) (holding that University official's removal from a history department display of two photographs of professors with historic weapons and uniforms violated prohibition on viewpoint-based discrimination because the photos "expressed the plaintiffs' view that the study of history necessarily involves a study of military history, including the use of military weapons," and was not merely content-based);

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 584 (7th Cir. 1995), *cert. denied*, 117 S.Ct. 1822 (1997) (holding that municipal prohibition on the plaintiffs' display of a menorah in a public building during Chanukah discriminated against the plaintiffs' "viewpoint" on the "subject" of "the holiday season"); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (reinstating a viewpoint discrimination claim arising from a county's barring a religious monolith from a public lawn that already contained a similar privately erected structure); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278-79 (10th Cir.) (striking down as viewpoint-discriminatory a restriction on religious discussions and activities at city-run senior centers), *cert. denied*, 117 S.Ct. 360 (1996).

III. THE COURT OF APPEALS' ANALYSIS IN CONCLUDING THAT THE ACT IS REASONABLE IN LIGHT OF THE PURPOSE OF EXCHANGES CONFLICTS WITH THE ANALYSIS EMPLOYED BY OTHER COURTS OF APPEALS AND IS FUNDAMENTALLY FLAWED.

Even if the majority were correct that military exchanges are nonpublic fora, and that the Act is not viewpoint-based, its decision nonetheless conflicts with the reasoning of other Circuits and is clearly wrong, warranting this Court's review because of the importance of the First Amendment rights at stake. Content-based, non-viewpoint-based regulation of speech in a nonpublic forum is permissible only if it is "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806.[17] Contrary to the majority's approach, which simply deferred to the government's post-hoc arguments and sup-

[17] The Act is patently unreasonable in light of the purposes of military exchanges. Exchanges are expressly designed to duplicate stores available to the general public and to be the "primary source" of expressive materials and other goods military personnel request for their comfort and convenience, at reduced prices. *Supra* p. 2-4. The Act, however, makes it less convenient and more expensive to purchase certain constitutionally protected materials that service members have demonstrated they want to purchase.

positions, other Circuits have recognized that this test "requires more than does the traditional rational basis test." *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996); *Searcey v. Harris*, 888 F.2d 1314, 1321-22 (11th Cir. 1989) (requiring evidentiary support for reasonableness of government ban); *see also Cornelius*, 473 U.S. at 810-811 (discussing evidence supporting reasonableness of conclusions).

The majority concluded that the Act's ban "is a 'reasonable' means of promoting the government's legitimate interest in protecting the military's image and its core values." Pet. App. 21a-22a. To begin, the "irrationality of this unique and puzzling regulatory framework ensures that the . . . ban will fail to achieve that end." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 1592 (1995). In *Coors*, this Court considered the constitutionality of a federal ban on alcohol content on beer labels. The Court observed that the fact that the government permits such information in beer advertising, and requires it for wine and spirits labels, necessarily means that the ban will not further a purported interest in avoiding customers' purchasing beverages with the highest alcohol content. Moreover, the Court concluded, "these exceptions and inconsistencies bring into question the purpose of the . . . ban." 115 S. Ct. at 1593. The failure to extend the prohibition "makes no rational sense if the government's true aim is [as stated]." *Id.* at 1592. So too here. The failure to ban *all* lascivious depictions and descriptions of nudity will actually create (not eliminate) an appearance of endorsement. *See supra* p. 18. If Congress' true aim were to promote "core values" and prevent the military's association with the materials banned, why would it ban only a narrow subset of sexually oriented materials and *allow* the sale of significant amounts of such material? And why would Congress permit military personnel to obtain the banned materials from their commanders so long as they were not charged for it; would not such activity "lead a service member to conclude that such materials were sanctioned by superior officers"

(Pet. App. 19a)? And why, if such materials really undermined military professionalism, honor, and decency, would Congress permit military personnel to possess the same materials obtained off-base or through the mail?

Even if it were clear that avoiding "endorsement" was Congress' goal, it is totally illogical to conclude, as did the majority, that "official endorsement [is] *inherent* in the military's resale of the proscribed materials." Pet. App. 28a (emphasis added). As both the district court and Judge Parker noted, exchanges sell all kinds of products, including cigarettes, alcohol, and condoms, yet no argument could be made that the government "officially endorses" smoking, drinking or non-procreative sex. *See id.* 60a; 42a (Parker, J., dissenting). *Cf. Tucker*, 97 F.3d at 1215 ("[R]easonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed."). Because decisions regarding what expressive materials are sold rest in large part on local demand, the military personnel themselves, not the exchanges, are "supporting" the products sold.[18] Pet. App. at 42a (Parker, J., dissenting).

Finally, Congress' " 'failure to select . . . simple available alternative[s] suggests' that the ban it has enacted is not reasonable." *Tucker*, 97 F.3d at 1216 (quoting *Multimedia Pub. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993)). One such alternative, suggested by Judge Parker—erecting non-endorsement signs—the majority refused to consider. *See* Pet. App. 42a. In that respect, as well, the majority's analysis of the reasonableness of the prohibition was inconsistent with the analysis employed by other Circuits.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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[18] DoD already takes steps to *regulate* the "adult" materials available through exchanges, by prohibiting their sale or rental to minors, placing them out of the reach of children, requiring covers, and prohibiting perusing. (J.A. 164-165).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1853 August Term, 1996

(Argued: April 16, 1997 Decided Nov. 21, 1997)

Docket No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC.; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION; NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS; PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.; RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; VIDEO SOFTWARE DEALER ASSOCIATION,
Plaintiffs-Appellees,

v.

WILLIAM S. COHEN,
in his official capacity as Secretary of Defense;
DEPARTMENT OF DEFENSE,
Defendants-Appellants.

Before: WINTER, *Chief Judge*, CABRANES and PARKER, *Circuit Judges.*

JOSÉ A. CABRANES, *Circuit Judge*:

In this appeal, we address whether Congress exceeded its constitutional authority in banning the sale or rental of "sexually explicit materials" by military personnel acting in an official capacity, including the sale or rental of

such materials by "military exchanges."[1] The United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) enjoined enforcement of the Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), after concluding that it violates the Free Speech Clause of the First Amendment[2] and the Due Process Clause of the Fifth Amendment.[3] *General Media Communications, Inc. v. Perry*, 952 F. Supp. 1072 (S.D.N.Y. 1997).

Heeding the Supreme Court's admonition that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged," *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), we hold that Congress acted well within its constitutional authority to regulate official military conduct.

Congress has not banned sexually-explicit magazines and videos—soldiers and sailors may still buy them elsewhere, receive them by mail, and read or watch them; Congress has decided only that the military *itself* will not be in the business of selling or renting these items to servicemembers. The appellees, who include publishers and producers of sexually explicit materials, argue that

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[1] Military exchanges may include retail stores, garages, restaurants, beauty shops, laundry facilities, newsstands, storage facilities, and recreational facilities. The exchanges are authorized to sell toiletries, stationery, clothing, jewelry, housewares, sporting goods, and automotive products, in addition to books, periodicals, and audio and video tapes. Joint App. at 127, 133-45, *reproducing* DoD Directive 1330.9 (Dec. 15, 1986).

[2] The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

[3] The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

their free speech rights will be abridged if the military stops selling and renting their products. But military exchanges are not public streetcorners; they are not available for everyone to "speak" from their shelves. These stores are nonpublic forums in which the government may restrict the content of speech, so long as the restriction is reasonable and it does not discriminate among particular viewpoints. Congress has regulated the military's purchase and resale of materials constituting a particular subject matter—lascivious depictions of nudity including sexual or excretory activities or organs—not those reflecting particular viewpoints. This policy avoids the appearance that the military, by selling sexually explicit materials in military exchanges, endorses these materials. As such, the policy is a reasonable way for Congress to uphold the military's image and core values of honor, professionalism, and discipline. Because the Act reasonably furthers legitimate governmental interests in a nonpublic forum without engaging in viewpoint discrimination, it does not violate the Free Speech Clause of the First Amendment.

The Act also does not violate the Fifth Amendment. Congress has considerable leeway in drawing distinctions as it decides how to implement particular policies. Insofar as the Act does not violate the First Amendment, its definitions and distinctions need only be rationally related to legitimate governmental interests. It passes that test, and so does not violate the equal protection guarantee of the Fifth Amendment. The Act's terms and meaning are also sufficiently clear to give the appellees notice of what will no longer be sold in military exchanges, and so the Act is not unconstitutionally vague.

The Constitution does not, of course, stop at the gates of a military base. But within those gates, "the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (internal quotation marks and citations omitted). Con-

gress, acting under its authority to maintain and regulate the armed forces, may constitutionally place some restrictions on the speech that occurs under military command. The Military Honor and Decency Act of 1996 embodies such a set of constitutional restrictions. Accordingly, we vacate the judgment of the district court and remand with instructions to enter judgment for the appellants.

I.

The Military Honor and Decency Act became effective on December 22, 1996, and provides in pertinent part:

> (a) PROHIBITION OF SALE OR RENTAL.—The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.
>
> (b) PROHIBITION OF OFFICIALLY PROVIDED SEXUALLY EXPLICIT MATERIAL.—A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.
>
> (c) REGULATIONS.—The Secretary of Defense shall prescribe regulations to implement this section.
>
> (d) DEFINITIONS.—In this section:
>
> (1) the term "sexually explicit material" means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

10 U.S.C. § 2489a. Pursuant to section 2489a(c), the Department of Defense issued a "directive-type memo-

randum"[4] implementing the Act that also became effective on December 22, 1996. This memorandum contains the following pertinent definitions:

1. *Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

2. *Sexually Explicit Material.* Material the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or ogans, in a lascivious way.

3. *Dominant Theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

4. *Lascivious.* Lewd and intended or designed to elicit a sexual response.

Joint App. at 63, *reproducing* DoD Directive-Type Memorandum, "Sale or Rental of Sexually Explicit Material on DoD Property" (Dec. 22, 1996). The memorandum also provides that "[m]aterial shall not be deemed sexually explicit because of any message or point of view expressed therein."

In addition, the memorandum establishes the "Resale Activities Board of Review" (the "Board"). The Board is obliged periodically to review material offered for sale or rental on military property to determine whether such material is sexually explicit. Any material that the Board finds to be "sexually explicit" according to the stated

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[4] A Department of Defense "Directive" is defined as a "broad DoD policy document containing what is required by legislation, the President, or the Secretary of Defense to initiate, govern, or regulate actions or conduct by the DoD." Joint App. at 70, *reproducing* DoD Directive at 5025.1-M, "DoD Directives System Procedures" (Aug. 15, 1994). A "Directive-Type Memorandum" is a document that, "because of time constraints, cannot be published in the DoD Directives System"; such a memorandum is later converted into a directive or instruction. *Id.*

terms of the memorandum is to be withdrawn from military retail outlets.

The district court found, and the parties do not dispute, that the Act bans only the sale or rental of sexually explicit material on military property. The Act does not restrict the possession of such material on military property, nor does it prohibit military personnel from sharing such material with their colleagues, so long as they do not sell or rent it. Additionally, military personnel may buy sexually explicit material off military property or order it through the mail. *See General Media*, 952 F. Supp. at 1075.

Appellee General Media Communications, Inc. ("GMC") publishes various periodicals, including *Penthouse*. The other appellees are various trade associations representing businesses engaged in the production, wholesale and retail distributions, and sale of periodicals, books, sound recordings, and home videos throughout the country.

Appellees brought suit in the district court in October 1996 seeking an injunction barring the enforcement of the Act and a declaratory judgment that the Act is unconstitutional. Appellees alleged, *inter alia*, that the Act infringes their rights to free speech and equal protection of the laws, in violation of the First and Fifth Amendments, and that the act is unconstitutionally vague, in violation of the Fifth Amendment. *See General Media*, 952 F. Supp. at 1075. On December 20, 1996, two days before the Act was to go into effect, the district court issued a temporary restraining order enjoining appellants from enforcing the Act until the court had decided appellees' motion for a preliminary injunction. Following parties' submissions of affidavits and declarations, the district court heard oral argument on December 31, 1996, and on January 13, 1997, the parties agreed to treat appellees' motion for a preliminary injunction as one for a permanent injunction. *Id.*; *see* Fed. R. Civ. P. 65(a)(2).

In an opinion and order dated January 22, 1997,[6] the district court granted appellees' request for injunctive relief, finding that the Act (i) infringed appellees' free speech rights in violation of the First Amendment; (ii) violated the equal protection guarantees of the Fifth Amendment; and (iii) violated the Due Process Clause of the Fifth Amendment in that it is unconstitutionally vague. *See General Media*, 952 F. Supp. at 1084.

The district court determined that "the purpose of the Act is to ban expression that is lewd." *Id.* at 1080. The district court further held that "because the First Amendment prevents the government from banning material solely because it is offensive," the Act violates the First Amendment. *Id.* The district court rejected the government's argument that the Act reasonably seeks to protect the military's professional appearance and to promote the military mission by fostering core values among personnel. The court reasoned that the Act "does nothing whatsoever to reduce the actual presence of sexually explicit material on military property," and that, absent congressional findings of fact, "it is unreasonable to equate the sale or rental of sexually explicit material in military exchanges with an official 'endorsement' " of that material. *Id.* at 1080-81.

Subjecting the Act to strict scrutiny, the court also held that section 2489a violated the equal protection guarantee of the Fifth Amendment. *Id.* at 1081-82. The district court noted that Congress made no factual findings, and that there was no evidence in the record, linking the Act to the military's goals of maintaining a professional image and of promoting core values. Similarly, the court found that there was no factual predicate to support the Act's distinction between audio or pictorial expression as opposed to written texts, as well as its differing treatment of books as opposed to periodicals. *Id.* at 1082.

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[6] An amended opinion and order, substantially identical in its holdings and statements of law, was entered on February 25, 1997.

The district court also held that the Act was void for vagueness because "the term 'lascivious' as it is used by the Act contains a subjective element." *Id.* at 1083. According to the district court, the risk that government officials would arbitrarily classify materials as sexually explicit "impermissibly chills plaintiffs' First Amendment rights," notwithstanding the fact that, as the court conceded, "plaintiffs cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their product." *Id.*

This appeal followed.

II.

We review the district court's order entering a permanent injunction for abuse of discretion, which "can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *See Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (internal quotation marks omitted). We consider in turn each component of the district court's decision that the Act (i) violates the Free Speech Clause of the First Amendment; (ii) violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment; and (iii) is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment.

A. The First Amendment

1. Forum Analysis

For purposes of the First Amendment's Free Speech Clause, the Supreme Court characterizes government property as falling into one of three categories. First, there is the "traditional public forum," which includes public streets and parks, and other "places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,

45 (1983)). The second category of government property is the "designated" public forum—"a place not traditionally open to assembly and debate," *Cornelius*, 473 U.S. at 802, but "which the State has opened for use by the public as a place for expressive activity," *Perry*, 460 U.S. at 45. In both traditional and designated forums that are fully open to the public, content-based regulations of speech are subject to "the highest scrutiny," and are permissible only if "narrowly drawn to achieve a compelling [governmental] interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).[6]

The third category of property, of most relevance in this case, is known as the "nonpublic forum," which consists of all remaining public property. *Id.* at 678-79. A limitation on speech in a nonpublic forum *may* be content-based, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992), and "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679; *see also Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991) (in nonpublic forum, "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner").

Governmental intent is said to be the "touchstone" of forum analysis. *Paulsen*, 925 F.2d at 69. The government does not create a public forum "by inaction or by permitting limited discourse," *Cornelius*, 473 U.S. at 802,

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[6] In designated public forums whose use is limited to particular purposes or speakers, restrictions on speech within those limits must be only reasonable and viewpoint neutral. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Travis v. Oswego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (in limited public forum, a "sub-category of the designated forum," once government "allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre"); *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 679-80 (2d Cir. 1988).

and when the state reserves property for its "specific official uses," it remains nonpublic in character, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). The Supreme Court has recognized that the government's dedication of property to a commercial enterprise is "inconsistent with an intent to [create] a public forum." *Cornelius*, 473 U.S. at 804. Likewise, evidence that the government has created a forum to further efficiency and administrative convenience suggests that the forum is nonpublic. *See id.* at 805. It is also well established that the presence of some expressive activity in a forum does not, without more, render it a public forum. *Id.* (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)).

Furthermore, the Supreme Court has emphasized that "it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' . . . And it is consequently the business of a military installation . . . to train soldiers, not to provide a public forum." *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). Accordingly, "[a]lmost without exception, courts have concluded that military bases fall into the non-public category." *Shopco Distrib. Co. v. Commanding General*, 885 F.2d 167, 172 (4th Cir. 1989). Military property generally becomes public in character only when the government has intentionally "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression." *United States v. Albertini*, 472 U.S. 675, 685-86 (1985).

Appellees argue that the military exchanges are public forums.[7] Focusing specifically on the "newsstands" and

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[7] It is unclear whether appellees contend that the exchanges are "limited public forums" in the sense that this Court has used the term—that is, as a "sub-category" of the "designated" public forum, in which the government may place blanket exclusions on

"bookstores" within the exchanges, appellees invite us to adopt the view that these "newsstands" are public forums because the government has granted "access" to these places to magazines, newspapers, and other "speakers." We respectfully decline this invitation.

As noted above, governmental intent is the touchstone for determining whether a public forum has been created. In this inherently factual inquiry into intent, we may look to factors such as the government's policy and practice with respect to the forum, the nature of the property, and its compatibility with expressive activity. *See Cornelius*, 473 U.S. at 802.

As an historical matter, exchanges and their predecessors, canteens, were established in the 1890s to provide uniformity of operation and control that had been lacking under the earlier system, in which profiteering private "sutlers" followed and supplied the troops. *See* Joint App. at 407-410, *reproducing* Maj. Stephen E. Castlen, *Let the Good Times Role: Morale, Welfare, and Recreation Operations*, Army Lawyer, June 1996, at 3, 5-6. The government did not create military exchanges for the purpose of providing a forum for expressive activity. Today, as in the past, the purpose of the military exchanges is to provide "authorized patrons with articles and services necessary for their health, comfort and convenience and [to provide] a supplemental source of funding for [military morale, welfare, and recreation] programs." Joint App. at 114, *reproducing* DoD Directive 1330.9 (Dec. 15, 1986). Although it is true that military

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certain types of speech, but may not discriminate unreasonably or on the basis of viewpoint among instances of those types of speech that have not been excluded, *see Travis*, 927 F.2d at 692—or that the exchanges are fully open designated public forums, in which content restrictions on speech are subjected to strict scrutiny, *see Lee*, 505 U.S. at 678. *See* Appellees' Brief at 28-29 (arguing that Act is subject to strict scrutiny because exchanges are "designated as limited public fora"). The question is irrelevant, however, in light of our holding that military exchanges are nonpublic forums.

exchanges sell books, periodicals, and other expressive materials, they also sell many other non-expressive materials. The mere fact that expressive materials are among the wide variety of general merchandise sold at the exchanges does not imply that the forum thereby becomes a public forum for First Amendment purposes. *See Cornelius*, 473 U.S. at 805. Rather, because military exchanges are "engaged in commerce," their operation is generally inconsistent with the creation of a public forum. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion).

The exchanges themselves are in no way *public*—in order to use a military exchange, or to purchase anything inside, patrons must show military identification. Only military personnel, their dependents, orphans, surviving spouses, and certain other affiliated personnel are admitted. These limits on patrons' access serve as another indicator that the government did not intend to dedicate the exchanges to expression and discourse; a limited audience would necessarily hinder, rather than further, the opportunities for communication by speakers such as appellees. The Supreme Court has noted that "separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *Lee*, 505 U.S. at 680. As restricted-access areas, even on bases which may be otherwise open to the general civilian public, the exchanges are "separated" properties.

Moreover, far from granting unlimited access to military exchanges to various "speakers," the government has simply chosen to purchase certain magazines, newspapers, and videos from third parties, and has offered this merchandise for resale to its personnel at military exchanges. Much like a private sector retailer, the government identifies the products that it will stock for resale, selecting from a universe of merchandise that is far more extensive than the shelves of an exchange can hold. It does not offer to resell the merchandise of every producer, or every

"speaker," who seeks access to those shelves. *Cf. Air Line Pilots Ass'n Int'l v. Dept. of Aviation*, 45 F.3d 1144, 1158 (7th Cir. 1995) ("[T]he government's status as a proprietor is a factor entering into public forum analysis. Proprietor status suggests, for instance, that the government has the power to define or restrict the use to which public property should be dedicated." (internal citations omitted)). In particular, the exchanges are only authorized to sell certain enumerated products listed in Department of Defense regulations, including specific provisions governing the sale of reading materials. *See, e.g.*, Joint App. at 147-50, *reproducing* Memorandum of Understanding, "Selling of Reading Materials in Military Commissionaries Located on Army, Air Force Installations" (Apr. 29, 1994).

Because it cannot be said that the military has "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression," *Albertini*, 472 U.S. at 685-86, we hold that the military exchanges governed by the Act are nonpublic forums.

2. Content & Viewpoint Discrimination

As noted above, the government may reasonably restrict expressive activity in a nonpublic forum on the basis of content, so long as the restriction is not "an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679. Appellees argue that the Act is in fact viewpoint-discriminatory (a question that the district court did not reach).[8] Were we

[8] The district court stopped short of the issue of viewpoint discrimination, and also of a holding on the nature of the forum, because it found that the Act did not promote a legitimate governmental interest. As these issues are questions of law, we are equally well positioned to decide them. Furthermore, in cases raising First Amendment issues we have "an obligation to make an independent examination of the whole record." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

to accept this characterization, the Act would be subject to much more exacting constitutional scrutiny.[9] We do not, however, agree with appellees. The Act assuredly distinguishes between permissible and impermissible speech on the basis of content, but it does not rise to the level of viewpoint discrimination.

As the Supreme Court has noted, the distinction between content and viewpoint discrimination "is not a precise one." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995). As a general matter, viewpoint discrimination represents a particularly "egregious" subset of content discrimination in which "the government targets not subject matter but particular views taken by speakers on a subject." *Id.* at 829. The Court thus suggests that the distinction is one between "subject matter" (content) and "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered" (viewpoint). *Id.* at 831. Working from this concededly imprecise distinction, we conclude that the Act does not involve viewpoint discrimination.[10]

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[9] *See Perry*, 460 U.S. at 48-49 (noting Seventh Circuit's application of strict scrutiny to viewpoint discrimination in nonpublic forum, *Perry Local Educators' Ass'n v. Hobit*, 652 F.2d 1286, 1295-97 (7th Cir. 1981), while proceeding on other grounds); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating, in context of nonpublic forum where restriction on speech was held to be viewpoint-discriminatory, that "the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech" (internal quotation marks omitted)); *cf. R.A.V. v. St. Paul*, 505 U.S. 377, 391-92 (1992).

[10] Another, related approach to what is meant by "viewpoint discrimination" also supports our conclusion. The Supreme Court's decisions dealing with viewpoint discrimination evidence particular hostility to restrictions specifically intended to suppress the circulation of the arguments on one side of a particular debate. *See, e.g., Lamb's Chapel*, 508 U.S. at 393 (finding viewpoint discrimination where school "permit[ted] school property to be used for the presen-

The Act prohibits the sale or rental of recordings and periodicals "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d). Appellees suggest that this construction targets a *viewpoint* portraying "women as sexual beings or as the focus of sexual desire," as well as a *viewpoint* of "lasciviousness." Appellees' Brief at 25. Even apart from the absence of any references to gender in the Act or its implementing directive,[11] we find this line of argument unconvincing. To conceive of lasciviousness as a "specific premise" or "a standpoint from which a variety of subjects may be discussed and considered" strikes us as linguistic

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tation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"); *R.A.V.*, 505 U.S. at 384 (government may not "proscrib[e] only libel critical of the government"), 388 (government may criminalize threats of violence against the President, but not "only those threats . . . that mention his policy on aid to inner cities"). Yet laws that restrict the dissemination of defined kinds of expression for reasons that stop well short of suppression of speech are less likely to be found constitutionally offensive on viewpoint grounds. *See, e.g., Perry*, 460 U.S. at 49 (finding no viewpoint discrimination where school allowed use of internal mail system by one union but not by rival union where reason for distinction was respective status of unions); *Lehman*, 418 U.S. at 304 (plurality opinion) (upholding, without any mention of viewpoint discrimination, city policy not to accept political advertisements on public transit system where reason for policy was to avoid appearance of favoritism). The statute at issue here falls into the latter category—it is apparently directed not to suppressing, but to disassociating the military from, appellants' speech. The Act prohibits the *military-sponsored* sale or rental of sexually explicit materials, but it does not suppress the private purchase, circulation, receipt, or possession of such materials on military property. By this reading too, then, the Act does not offend the prohibition against viewpoint discrimination.

[11] We cite the Act's gender neutrality not because it establishes the Act's viewpoint neutrality, but because it suggests that the appellees' own definition of the viewpoint allegedly under attack ("women as sexual beings") is contrary to the plain language of the statute.

overreaching; how, for example, would one go about discussing and considering the political issues of the day from a lascivious viewpoint? The adjective "lascivious" is much more plausibly understood as helping to identify more particularly the subject matter (*i.e.*, content) that the Act encompasses: namely, depictions of nudity including sexual or excretory activities or organs, but only those depictions that are also lascivious.

We note that the Supreme Court has suggested in dicta, but in an opinion that strictly applied the Constitution's prohibition against viewpoint discrimination, that "[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." *R.A.V.*, 505 U.S. at 388. Thus prurience and patent offensiveness are apparently permissible grounds on which to discriminate—and by implication, they do *not* constitute "viewpoints" (against which the government may not discriminate).[12] Insofar as *R.A.V.* equates prurience and patent offensiveness with "lascivious displays of sexual activity," lasciviousness too is impliedly not a "viewpoint." Other Supreme Court precedents construing the First Amendment support, by analogy, the reasoning that a distinction based on lasciviousness is viewpoint neutral. *See Bethel School Dist. N. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (school's sanctions "in response to [respondent's]

[12] We recognize, as the district court pointed out, that the language quoted is addressed to obscene speech, which is largely unprotected by the First Amendment, while speech that receives the protection of the First Amendment is at issue in this case. This does not mean, however, that the *R.A.V.* opinion and its logical implications are irrelevant to protected speech. To the contrary, *R.A.V.* provides that the First Amendment's prohibition against viewpoint discrimination applies to *both* protected and unprotected speech. 505 U.S. at 383-84, 391-92. The inference we draw from *R.A.V.* (above) that prurience and patent offensiveness are not viewpoints should similarly apply to both protected and unprotected speech.

offensively lewed and indecent speech" were permissible, given that "the penalties imposed in this case were unrelated to any political viewpoint"); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) ("an unconstitutional motivation would *not* be demonstrated" if school board removed books because they "were pervasively vulgar," rather than because of any intent to deny access to disfavored ideas).

In sum, we conclude that the Act discriminates on the basis of content, but not on the basis of viewpoint.

3. "Reasonableness" Analysis:

We now reach the question actually decided by the district court: whether the Act's restrictions on expressive activity are reasonable and therefore consistent with the Free Speech Clause of the First Amendment. Employing the same reasonableness standard used by the district court, but reaching the opposite conclusion, we hold that they are.

Because we conclude that the Act regulates speech in a nonpublic forum in a viewpoint-neutral manner, the Act need only be reasonable in light of the purpose of the forum, *Perry*, 460 U.S. at 49, and reflect a legitimate government concern, *Paulsen*, 925 F.2d at 69, in order to pass constitutional muster. The Supreme Court has admonished that a restriction in a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

Furthermore, we have only recently noted that "[i]t is plain to us that governmental restrictions on speech that would run afoul of the Constitution if imposed in civilian life can pass constitutional muster in the military context." *Able v. United States*, 88 F.3d 1280, 1294 (2d Cir. 1996). "Our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society . . . and

the tests and limitations to be applied may differ because of the military context." *Id.* (internal citations and quotation marks omitted).

This deference arises from the long-recognized distinctive conditions of military life. The Supreme Court has instructed that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). This is so because, as the Court has observed, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian, and . . . the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker*, 417 U.S. at 744 (internal citations and quotation marks omitted). Moreover, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs." *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

As the Court has emphasized, "civil courts are ill equipped to establish policies regarding matters of military concern." *Solorio v. United States*, 483 U.S. 435, 448 (1987) (internal quotation marks omitted). For these reasons, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Goldberg*, 453 U.S. at 70. We are not free to ignore this admonition. We believe the district court erred by not giving due credit to the singular governmental interests in oversight of the military, and to the reasonableness of the measures selected to advance those interests in the instant case.

The appellees argue, and the district court apparently agreed, *see General Media*, 952 F. Supp. at 1080, that,

in order to identify the governmental interest furthered by the Act, a court must find or uncover either legislative history or a statement of the purpose of the statute within its text.[13] The appellees have not drawn to our attention any authority for the proposition that a statute may be held defective because its legislative history is sparse or virtually non-existent, nor are we aware of any such authority. Indeed, if the sparseness of legislative history were a basis for invalidation of acts of Congress, a wide swath of legislation could fall before the judicial axe. In any event, the very title of the Act—the Military Honor and Decency Act—suggests the governmental interest that the statute purports to advance.

The government argues that the sale by the military of lascivious materials in military exchanges risks sending a message that the military approves of or endorses these materials. The pervasive authority of the hierarchical chain of command in the military setting could reasonably lead a servicemember to conclude that such materials were sanctioned by superior officers—a conclusion that would prove accurate, for example, in the case of Navy exchange facilities, where the Navy's resale regulations provide that "adult" magazine titles stocked by the exchange, and even the determination of which magazines qualify as "adult-oriented," are to be "coordinated with

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[13] In particular, appellees and *amici* focus considerable attention on the public statements of various legislators during and after the Act's passage—from which we are apparently asked to divine the true purpose of the measure. However, the motivations of individual legislators, to the extent we may be able to discern them, are not dispositive. As the Court of Appeals for the Ninth Circuit has recognized, "remarks of a legislator, *even those of the sponsoring legislator*, will not override the plain meaning of a statute." *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991) (emphasis supplied). We agree. Even where the meaning of a statute would benefit from exposition, legislators' pre-passage remarks are not presumptively conclusive. Furthermore, the *post*-passage press release of an individual legislator, upon which appellees rely, cannot be accorded any significance or weight.

the base commanding officer." Joint App. at 204, *reproducing* Navy Resale Manual vol. 4, § 4108(6)(a)(1). The government argues that its sale of such materials could tarnish "the military's image of honor, professionalism, and proper decorum. It notes that "[t]he military also encourages its personnel to 'lead by example' and to display the highest form of personal and professional conduct." This policy, in the government's view, could be undermined if military personnel believed that military commanders approved of the sale of the proscribed materials at exchanges.[14] Accordingly, the government argues that the Act promotes military honor, professionalism, proper decorum, and military "core values." [15]

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[14] We also note that the government's interest in disassociating itself from sexually explicit materials may be enhanced by the military's role as an employer. Military installations are workplaces for the civilian and military personnel assigned there; like private sector employers, the military may have an interest in maintaining a workplace environment that is efficient and focused on the task at hand—not one littered with materials that are "intended or designed to elicit a sexual response," DoD Directive-Type Memorandum (Dec. 22, 1996).

[15] The dissent argues that this objective—the government's promotion of military honor, professionalism, and proper decorum, *as defined by Congress and the military*—is itself proof that the Act is viewpoint discriminatory. This is so, according to the dissent, because the government's determination that the sale of lascivious materials is inconsistent with these military values deprives individual soldiers of "the right to decide for themselves whether such depictions are consistent with those values." *Post* at ——. Apparently, then, the military may not promote or enforce its own definition of honor, professionalism, and proper decorum, because if it does so, thereby trumping a soldier's own definitions of those terms, it will be engaging in unconstitutional viewpoint discrimination. We think this cannot be the case: surely, for example, the military could decide that bigotry is inconsistent with military professionalism and proper decorum, not to mention honor, and could promote that definition, overriding, individual soldiers' opinions to the contrary. Indeed, the dissent itself asserts that it "do[es] not doubt that the government can lawfully enact statutes that promote the military's image of honor, professionalism, and proper decorum, or foster core values." *Post* at ——.

We are neither free nor inclined to disregard or treat cavalierly military goals and policies put forward by the government where Congress has exercised its constitutional responsibility of "mak[ing] Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and the Chief Executive and "Commander in Chief of the Army and Navy of the United States," U.S. Const. art. II, § 2, cl. 1, has signed the Act into law and speedily implemented it by executive directive. The government's stated goals are clearly promoted by a policy of ending the military's involvement in the sale of sexually explicit materials. Accordingly, we hold that the Act reflects a legitimate governmental concern.

To pass constitutional muster, the Act must also be "reasonable" in light of the purpose of the forum. *See Perry*, 460 U.S. at 49. As outlined above, the purpose of military exchanges is to operate as commercial outlets at which servicemembers may purchase "articles and services necessary for their health, comfort and convenience." Revenues from exchanges also supplement the funding of military morale, welfare, and recreation programs. Congress could reasonably conclude that sexually explicit materials are not "necessary" to the health, comfort and convenience of members of the armed forces. Furthermore, like any commercial retailer, the military must make decisions about what articles to stock on its limited shelf space. In doing so, a retailer may reasonably take into account not only profit margins, but also the special circumstances of its clientele. Here, the special circumstances of the military environment, in which the appearance of professionalism and proper conduct is critical, could reasonably lead to the conclusion that this retailer should not stock sexually explicit materials. The Act is thus reasonable in light of the purpose of the military exchange "forum."

The Act is also a "reasonable" means of promoting the government's legitimate interest in protecting the mili-

tary's image and its core values. The Act bars the sale or rental of sexually explicit materials on military property by military employees acting in an official capacity. This legislation is specifically targeted at the problem identified above—that military honor, professionalism, and decorum will be affected or tainted by the official, military-sponsored sale of such materials. The problem the Act seeks to address, in short, is that the military should not be in the business of selling sexually explicit materials, and the solution embodied in the Act is to forbid the military from doing so. This would appear to be an altogether reasonable means of distancing the military from a perceived endorsement of these materials.

For the reasons set forth above, we hold that the Act does not violate the First Amendment.

B. The Equal Protection Guarantee of the Fifth Amendment's Due Process Clause

The district court also found that the Act violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment. Specifically, it found that the Act's disparate treatment of books and periodicals (barring only the latter), and its restrictions on pictorial and audio expression, but not on written text, violated the Fifth Amendment's guarantee of equal protection. *See General Media*, 952 F. Supp. at 1082.

We approach equal protection claims under the Fifth Amendment in the same way as we would such claims under the Fourteenth Amendment. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). In considering whether legislation violates equal protection principles, "[a]t a minimum, a statutory classification must be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under this analysis, a statutory classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis

for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Classifications affecting fundamental rights, however, must survive heightened scrutiny. *Id.* The Supreme Court has noted that "[w]hen government regulation discriminates among speech-related activities *in a public forum*, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (emphasis supplied) (finding equal protection violation based on discrimination among expressive activities in public forum); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96-97 (1972) (same). That exacting standard of review is not applicable here, however, because "[t]he key to those decisions [*Carey* and *Mosley*] . . . was the presence of a public forum." *Perry*, 460 U.S. at 55. Here, where a nonpublic forum is involved and where, as we have found, there is no First Amendment violation, the Act need only survive rational-basis analysis. *See id.* at 54-55; *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 231 (2d Cir. 1996).

The Act's distinction between written and visual forms of expression, and its ban on lascivious expression contained in audio, video, and periodical materials, but not in books, are rationally related to a legitimate governmental interest. Congress could rationally have concluded that exchanges do not trade extensively in books containing sexually explicit material and that, consequently, it was unnecessary to include books under the Act's prohibition. Congress could also have rationally concluded that visual forms of lascivious expression are more prevalent, more likely to be noticed, or more provocative than written materials, and that accordingly there was a greater need to regulate such materials. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy

there, neglecting the others."); *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Rational basis review does not pass judgment upon the wisdom, fairness, or logic of legislative decisions; it turns on whether there are "plausible" reasons for Congress's choices.[16] *Beach*, 508 U.S. at 313-14. Because there are rational justifications for the classifications created by the Act, the appellees' equal protection claim fails.

C. *Vagueness Under the Due Process Clause of the Fifth Amendment*

The district court also found the Act to be vague, in violation of the Due Process Clause of the Fifth Amendment. We disagree, believing that the district court here too was insufficiently sensitive to the particular context presented—namely, the specialized and strictly-regulated community of the armed forces.

The Due Process Clause requires that laws be crafted with sufficient clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and to "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The degree of linguistic precision that will satisfy these requirements, however, varies with the nature —and in particular, with the consequences of enforcement

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[16] We note that the absence of "Congressional findings of fact . . . and evidence on the record" in support of these distinctions, *General Media*, 952 F. Supp. at 1082, has no bearing on our analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). It is even irrelevant "whether the conceived reason for the challenged distinction actually motivated the legislature" so long as there is a "plausible reason[] for Congress' action." *Beach*, 508 U.S. at 313-15 (internal quotation marks omitted).

—of the statutory provision. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). For example, as the Supreme Court noted in a criminal obscenity case, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948); *see also Village of Hoffman Estates*, 455 U.S. at 498-99. At the same time, statutes that implicate constitutionally protected rights, including the freedoms protected by the First Amendment, are subject to "more stringent" vagueness analysis. *Village of Hoffman Estates*, 455 U.S. at 499.

These generally applicable standards, however, are modified in the military setting. We have recently reiterated the longstanding principle that "the [constitutional] tests and limitations to be applied may differ because of the military context," *Able*, 88 F.3d at 1294, and the Supreme Court has instructed us that substantial judicial deference is required in the military setting, *see, e.g., Goldberg*, 453 U.S. at 70. Specifically, the Court has stated that "[f]or the reasons which differentiate military society from civilian society . . . Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756.

Applying these principles to the Act before us, it is clear the statute may fall short of absolute linguistic precision and yet still comply with the requirements of the Due Process Clause of the Fifth Amendment. First, the Act carries with it no criminal penalties; in fact, it specifies no penalties at all. The "penalty" that appellees complain of is an indirect one: if the Act is enforced against military personnel and the Department of Defense (who are, after all, the entities who are barred from selling or renting sexually explicit materials), appellees will suffer the penalty of losing the government's assistance in (re)-selling their wares. Appellees will lose their preferred

retail outlets for members of the armed forces, but they are not prevented from selling and renting sexually explicit material directly to servicemembers. Second, the Act represents an exercise of Congress's constitutional power to prescribe "Rules for the Government and Regulation" of the armed forces, U.S. Const. art. I, § 8, cl. 14. As such it must be accorded the "greater breadth and greater flexibility" indicated by the Supreme Court in *Parker*, 417 U.S. at 756. And third, while the Act implicates expressive activity and thus warrants a more stringent vagueness analysis, *Parker* is again instructive. That case too involved expressive activity—a military officer's statements to other servicemembers—that was the basis for a conviction for, *inter alia*, "conduct unbecoming an officer and a gentleman." 417 U.S. at 737-38. Although it involved a direct penalization of speech, the Supreme Court accorded Congress "greater flexibility" and upheld the Uniform Code of Military Justice provision against a vagueness challenge. *See id.* at 756-57. Congress is entitled to that same flexibility here, where the penalties are far less direct or severe.

Measured by these guideposts, we conclude that the Act does not offend the Due Process Clause of the Fifth Amendment. Many of the terms employed in the Act, read in light of the explanatory directive implementing it, have been found by the courts to be sufficiently clear for constitutional purposes. And whatever ambiguity remains, if any, is constitutionally tolerable in light of the generous vagueness standard outlined above.

For example, the Supreme Court has rejected as "insubstantial" a claim that the term "lascivious" in a criminal statute was unconstitutionally vague. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994). In doing so the Court explicitly adopted the view of the Court of Appeals for the Ninth Circuit that "lascivious" could be equated with "lewd," *id.*, which the Ninth Circuit described as "a commonsensical term whose consti-

tutionality was specifically upheld in *Miller v. California* [413 U.S. 15 (1973)]." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) (internal citation and quotation marks omitted), *rev'd on other grounds*, 513 U.S. 64 (1994). The district court in the instant case nevertheless found vagueness in the adjective "lascivious" based on its determination that the word "contains a subjective element." *General Media*, 952 F. Supp. at 1083. We note that the same could be said for any number of the words which in combination make up our constitutional test for obscenity. *See Miller*, 413 U.S. at 24.[17] Other terms employed in the Act and its regulations are also familiar to the courts. The term "dominant theme," for example, has long been employed in First Amendment law. *See, e.g., Roth v. United States*, 354 U.S. 476, 489 & n.26 (1957); *United States v. Petrov*, 747 F.2d 824, 830 (2d Cir. 1984).

The question presented is not whether the Act or its terms include *any* ambiguity or "subjectivity"; in some expansive sense, *all* words contain a degree of imprecision and are unavoidably open to interpretation. The question is whether any ambiguity that does exist rises to the level of unconstitutional vagueness under the Due Process Clause of the Fifth Amendment. In light of the permissiveness of the scrutiny that we apply to this military regulation carrying only indirect, financial consequences, we hold that it does not.

III.

To summarize:

(1) In adopting the Act, Congress reasonably furthers legitimate governmental interests—*inter alia*, upholding

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[17] *Miller* specifies that "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" may be regulated as legally obscene. 413 U.S. at 24.

military honor, professionalism, and proper decorum by eliminating the appearance of official endorsement inherent in the military's resale of the proscribed materials—and it does so in a nonpublic forum, without engaging in viewpoint discrimination. Accordingly, the Act does not violate the Free Speech Clause of the First Amendment.

(2) The Act's distinctions among the types of materials it regulates are rationally related to legitimate governmental interests. As a result, those distinctions do not run afoul of the equal protection guarantee of the Due Process Clause of the Fifth Amendment.

(3) The Act is sufficiently clear, in light of the appropriate level of scrutiny accorded to a military regulation carrying only indirect, civil penalties, to survive a vagueness challenge under the Due Process Clause of the Fifth Amendment.

Accordingly, the judgment of the district court is vacated and the cause is remanded with instructions to enter judgment for appellants.

PARKER, *Circuit Judge*, dissenting:

Freedom of speech is one of those liberties which is so fundamentally essential to the preservation of a stable Government that the Government itself is generally prohibited from interfering with it, and as an Article III court, we are bound to protect it. But the power of Congress to "raise and support Armies" and "provide and maintain a Navy" under Article I, § 8, of the Constitution is also critical to the preservation of both a stable Government and to the protection of our liberties, of which the First Amendment is one. In cases of conflict, the balance is often struck in favor of protecting the military mission. This is true, not only with respect to strategic defense matters such as the protection of sailing dates and location of troops,[1] but also with respect to that part of the military mission directed toward the preparation of armies and navies "to fight or be ready to fight wars should the occasion arise," *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). " 'The armed forces depend of a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.' " *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *United States v. Gray*, 20 C.M.A. 63 (1970)).

For these reasons, the Supreme Court has held that "judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is chal-

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[1] In a time of war, for example, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

lenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). However, "deference does not mean abdication," *id.* "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind them when they enter military service." *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).[2] In short, the fact that the interests of the individual may sometimes be validly subordinated to " 'the needs of service,' " *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)), does not mean service members lose those rights whenever Congress, in exercising its power to raise armies, so desires. When First Amendment protection bows to the military's desire to suppress certain ideas without a clear and strong reason, desire to protect our liberties with a strong military authority may end up eroding our liberty to speak freely and to be tolerated in doing so.

The Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), prohibits "the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," which includes military exchanges. 10 U.S.C. § 2489a(a), (d)(2). The Act bans audio and video recordings, and periodicals with visual descriptions, produced in any medium, but does not ban purely written material. 10 U.S.C. § 2489a (d)(1). The term "sexually explicit material" is defined as material "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." *Id.* "Lascivious" is defined by the implementing regulations to mean "lewd and in-

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[2] *See also Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("These aspects of military life [obedience and unity] do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."); *United States v. Robel*, 389 U.S. 258, 264 (1967) (" 'Even the war power does not remove constitutional limitations safeguarding essential liberties' ") (citations omitted).

tended or designed to elicit a sexual response." Department of Defense Directive-Type Memorandum, "Sale or Rental of Sexually Explicit Material on DoD Property" (Dec. 22, 1996). This memorandum also establishes the "Resale Activities Board of Review," which has "the authority and responsibility to periodically review material offered or to be offered for sale or rental" at exchanges, and to determine whether such material is "sexually explicit" as defined by the memorandum. *Id.*

The court below granted appellee's request for permanent injunctive relief on the basis that the Act violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. It reasoned that because the purpose of the Act was to ban expression that the government conceded was "offensive" and "because the First Amendment prevents the government from banning material solely because it is offensive," the Act was unconstitutional. The district court did not decide whether a military exchange is a public or nonpublic forum, nor whether the Act was viewpoint discriminatory. I agree with the majority that, as these issues are questions of law, we are equally well positioned to decide them. However, that is where my agreement with the majority ends. I would affirm the district court's opinion.

I.

The Military Honor and Decency Act of 1996 does not prohibit the distribution of all sexually explicit material in military exchanges. Nor does it ban all depictions of nudity. Instead, it bars only the distribution of sexually explicit material, "the dominant theme of which depicts or describes nudity . . . in a lascivious way." Because I believe this is viewpoint discrimination, and the government has failed to meet its burden of justification for this restriction on speech, I respectfully dissent.

The Act's definition of sexually explicit material includes within its scope much that is not encompassed

within the Supreme Court's definition of "obscenity," which enjoys virtually no First Amendment protection. To be "obscene" under *Miller v. California*, 413 U.S. 15 (1973), a publication must (a) taken as a whole and applying contemporary community standards, appeal to the prurient interest, (b) contain patently offensive depictions or descriptions of specified sexual conduct, and (c) on the whole have no serious literary, artistic, political or scientific value. *Id.* at 24-25. *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497 (1985). The Act does not refer to the prurient interest or to the standards of the community. Nor does it require that the work lack literary, artistic, political or scientific value. The Act therefore covers both protected and unprotected speech. *See also Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."). It is the protected speech that is addressed here.

It is axiomatic that the government may not restrict speech because of the message it conveys. *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972); *see also Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ——, 115 S. Ct. 2510, 2516 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."). Moreover, "[w]hen government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination." *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form . . ."). Even in a nonpublic forum, the government may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46; *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Although a speaker may be ex-

cluded from a nonpublic forum if he wishes to address a topic not encompassed within the purposes of the forum . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.")[3]

As the majority points out, the distinction between content and viewpoint discrimination is not "a precise one." However, the majority's assertion that "lascivious" is an adjective identifying subject matter does not advance the inquiry: viewpoints and subject matters are both identified by some adjective—the question is whether the statute will skew one side of a debate. "Indecent" speech, or even "sexually explicit" speech, may be regarded as a category of speech, and the regulation of such speech is a content-based regulation. *See Sable Communications*, 492 U.S. at 126. To divide that category between depictions of nudity and other depictions, is yet another division, one step closer to viewpoint discrimination. But in banning distribution of only those depictions of nudity that are "lascivious," defined as "lewd and intended or designed to elicit a sexual response," the government is necessarily attempting to regulate a specific perspective—a point of view.

Portrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination. Depictions of nude men and women in nonsubmissive ways, or in ways not designed to arouse, are permitted under the Act. This is, under relevant precedent, viewpoint discrimination. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (de-

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[3] Since I conclude that the Act is viewpoint discriminatory, I do not need to decide, and express no view on, whether a military exchange on a military base constitutes a traditional or "designated" public forum or a nonpublic forum.

nying permission to evangelical church to use school facilities to show a film about child rearing and family values solely because the film dealt with a subject from a religious perspective was viewpoint discriminatory when that subject had not been placed off limits to any and all speakers); *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985) (striking down an ordinance prohibiting trafficking in pornography, where pornography was defined as expressive material that depicts women as sexual objects, or as enjoying or deserving humiliation), *aff'd mem.,* 475 U.S. 1001 (1986); *AIDS Action Comm. v. MBTA,* 42 F.3d 1, 12 (1st Cir. 1994) (holding that transit authority's refusal to accept advertisements regarding AIDS prevention for display in subway cars when it had allowed other sexually explicit material to be advertised which represented "the conventional exploitation of women's bodies" was viewpoint discrimination). It is no answer that the Act excludes such depictions of both men and women: the exclusion of "an entire class of viewpoints" is "just as offensive to the First Amendment as exclusion of only one." *Rosenberger,* 115 S. Ct. at 2518. If multiple voices are silenced, the debate is simply skewed in multiple ways. *Id.*[4]

Nor is this form of expression any less deserving of protection because it may work through "inexpressible emotions," *Cohen v. California,* 403 U.S. 15, 26 (1971). Just as words may be chosen for their emotive force, *id.*, so too visual pictures can be chosen for their ability to arouse or offend. By restricting the sale of depictions which some viewers find offensive and others titillating, the government favors and protects the viewpoint of those offended and restrict the viewpoint of those who are titillated. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit

[4] Thus, the majority's allusion to the fact that the Act does not reference gender does not alter the statute's viewpoint discriminatory characterization.

the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Indeed, the government's defense of the statute unmasks the Act's viewpoint discrimination. The government asserts that the statute serves the government's interest in preserving "the military's image of honor, professionalism, and proper decorum." The underlying premise is that the military's distribution of depictions of nudity that are lewd or intended to elicit a sexual response are inconsistent with "honor, professionalism, and proper decorum." Yet the decision to ban distribution of such material strips military personnel of the right to decide for themselves whether such depictions are consistent with those values.[5] It even arguably denies them the right to determine which displays of nudity are lascivious.[6] "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving

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[5] The fact that this decision is removed from the potential consumers and rests entirely in the discretion of the Resale Activities Board of Review increases the danger that the government is censoring viewpoints. As the Supreme Court stated in *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 763 (1988):

> [A] law or policy permitting communication in a certain way for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

[6] I disagree with the majority's assertion that this argument would prevent the military from enforcing its own definition of honor, professionalism and decorum, such as by deciding that bigotry is inconsistent with those goals, ante at ——. The fact that the government could present a valid military interest to justify regulation of bigotry within the military does not alter the analysis of whether such regulation is viewpoint discriminatory in the first instance. As noted below, post at —— n.8, it is clear that the military can, in certain circumstances, prohibit expression because of the message conveyed. To do so, however, it must also show how conveyance of the message will interfere with performance of the military mission.

of expression, consideration, and adherence." *Turner Board. Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994); *see also Board of Educ. v. Pico,* 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom.").

Thus, the majority's claims that one does not "go about discussing and considering the political issues of the day from a lascivious viewpoint," is beside the point. It ignores the political issue of whether nonobscene, lascivious material, whatever form it may take, is necessarily inconsistent with the military's image of honor, professionalism and decorum, or the promotion of core values.

The majority's claim that the Supreme Court's dicta in *R.A.V. City of St. Paul,* 505 U.S. 377, 388 (1992), that "[a] State might chose to prohibit only that obscenity . . . which involves the most lascivious displays of sexual activity," authorizes the government to ban distribution of all lascivious portrayals of sexually explicit materials, ante at ——, is misguided for two reasons. Not only is nonobscene sexually explicit speech protected, unlike the obscene speech which is the subject of the Supreme Court's hypothetical, but to exclude only the most lascivious displays of sexual activity still allows in "the marketplace of ideas" the views expressed by lascivious displays of sexual activity, even if it prohibits the most extreme of those views.

II.

Laws which favor one viewpoint over another are traditionally subjected to the highest level of scrutiny.[7] The

[7] As the majority notes, the Supreme Court has at least twice noted without disapproval Circuit Court's application of strict scrutiny review to viewpoint discrimination. *See Perry,* 460 U.S. at 48-49 (holding that the exclusion of rival union from teachers' internal mail system was viewpoint neutral and therefore valid); *Lamb's Chapel,* 508 U.S. at 394 (holding a law invalid as viewpoint discriminatory); *see also R.A.V.,* 505 U.S. at 431 (Stevens, J., con-

question is whether, in reconciling the deference due Congress in military matters and our own constitutional responsibility, we must not only give deference to the military judgment as to the importance of the military interest, but must also lower the level of First Amendment scrutiny that would otherwise be applied.

In *Parker*, the Court upheld a court-martial conviction of an army captain for conduct designed "to promote disloyalty and disaffection among the troops" for publicly advocating that no "colored soldier" should go to Vietnam, and should refuse to fight if sent because they are discriminated against. 417 U.S. at 758. The Court stated:

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id.

Thus, it is clear that, on a military base, some regulations [8] that restrict speech because of the message con-

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curring) ("[V]iewpoint-based restrictions of expression require greater scrutiny that subject-matter-based restrictions."). However, the view that viewpoint discrimination is per se unconstitutional has also been expressed. *See, e.g., R.A.V.*, 505 U.S. at 392 (Scalia, J., for the Court) ("[The City] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

[8] The article of the Military Code under which Levy was convicted extended to " '[c]ertain disloyal statements by military personnel,' " and was intended to cover viewpoint-based speech: " '[e]xamples are utterances designed to promote disloyalty or disaffection among troop, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' " *Parker*, 417 U.S. at 753 (quoting the Manual for Court's Martial 213c (1969)).

veyed are permissible. But the speech in *Parker* was obviously central to the military mission: as the Supreme Court noted, while there was a possibility that the articles of the military code under which Levy was convicted could extend to conduct protected by the First Amendment, Levy's conduct, "that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment." *Id.* at 761. Where the speech and the message conveyed are less harmful to the military mission, courts have declined to uphold the restriction. *See, e.g., Schacht v. United States*, 398 U.S. 58, 61-62 (1970) (striking down a law making it a crime for an actor wearing a military uniform to criticize the conduct or policies of the Armed Forces, or say anything that would "tend to discredit" the military); *Bryant v. Secretary of the Army*, 862 F. Supp. 574, 584 (D.D.C. 1994) (striking down portion of legislation prohibiting publication in Army newspaper of material "non in consonance" with Army policy).

In *Brown v. Glines*, 444 U.S. 348 (1980), the Supreme Court considered a regulation which authorized an army base commander to exclude campaign literature (in the form of leaflets and pamphlets) from the base, when such literature presented a "clear danger to the loyalty, discipline, or morale" of the troops. *Id.* at 350. The Court emphasized that the regulations "specifically prevent[ed] commanders from halting the distribution of materials that merely criticize the Government or its policies" and that under the regulations the Air Force commanders had no authority "to prohibit the distribution of the magazines and newspapers through regular outlets such as the post exchange newsstands." *Id.* at 355.[9] The Court upheld the

[9] The Court also noted a Department of Defense Directive that advised commanders to "preserve servicemen's 'right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security.'" *Id.* at 355.

regulations because they "restrict[ed] speech no more than [was] reasonably necessary to protect the substantial government interest." *Id.* at 358.

Last year this Circuit picked up the intermediate standard of review articulated in *Brown v. Glines* and stated in dicta that the test should be applied to content-based restrictions as well as content-neutral restrictions:

> In the military context, however, as noted above, free speech rights are substantially diminished and the court's deference to the views of Congress and the military as to the need for speech restriction based on the requirements of discipline and readiness is high. Arguably, even a content-based restriction in the military context need only pass the test of *Brown v. Glines.*

United States v. Able, 88 F.3d 1280, 1296 (2d Cir. 1996). Although I am not convinced that it is appropriate to take the further step of applying this intermediate standard of review to laws which discriminate on the basis of viewpoint, I do not need to decide that issue here. Even applying the intermediate standard of review in this case, the government has failed to meet its burden.

III.

The government argues that pornography is "controversial and unpalatable to many" and that "Congress could therefore reasonably conclude that the exchanges' traffic in lascivious merchandise tarnishes the military's image of honor, professionalism, and proper decorum." It is, additionally, argued that the possible perception of military personnel that lascivious material sold at the base exchanged has been approved by the chain of command "subverts the military's goal of promoting core values." The government further claims that the Act is "narrowly tailored to prevent only the official condonation of this merchandise" because it leaves military per-

sonnel free to possess, view or listen to sexually explicit material either on or off base, and to acquire such material from private retailers through the mail or from each other if done unofficially.

The fact that Congress "could" have drawn such a conclusion, however, provides the Court no reason to conclude that Congress in fact did so, nor does it assist the inquiry whether a ban of distribution is necessary to protect the military's image. Significantly, the government offers no evidence, by way of congressional hearings, official reports, explicit congressional findings of fact, or military judgment to support its claims. Instead, the government urges us to accept its unsubstantiated post-hoc rationalization on the principle of judicial deference to congressional choice.

There is no question that "when evaluating whether military needs justify a particular restriction . . . courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman*, 475 U.S. at 507. This is not just because the military is a "specialized society separate from civilian society," and because the "'right of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," *Parker*, 417 U.S. at 743-44 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)), but because, as this Court in *Able* pointed out, "[a]s judges, we are 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" 88 F.3d at 1293 (quoting *Goldman*, 475 U.S. at 507).

However, the precedents supporting judicial deference to military judgment have relied on substantial evidence of the types outlined above, to justify the infringement on the constitutional right at issue. *See, e.g., Rostker*, 453 U.S. at 72-74 (upholding, over an equal protection challenge, a regulation authorizing the President to require

registration for military service of males but not females, deferring to extensive national attention and public debate, a report of the Senate Armed Services Committee, hearings held by both Houses and consideration by various other committees that "clearly establish[ed] that the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.' ") (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)); *Able*, 88 F.3d at 1285-86 (noting that extensive hearings were held in both houses of Congress on the issue of the military's treatment of homosexuals following Presidential directive to revise policy, and the Act itself contained 15 separate findings justifying Congress' decision to enact the "Don't ask, Don't tell" policy). *See also Parker*, 417 U.S. at 740-41 (noting that the district court relied on "the voluminous record of the military proceedings" and that "the military tribunals had given fair consideration [to appellee's claims]"). In this case, the only evidence the government offers in support of its arguments is the title of the Act.

I do not doubt that the government can lawfully enact statutes that promote the military's image of honor, professionalism, and proper decorum, or foster core values. It can, for example, validly prosecute military personnel for conduct "unbecoming an officer and a gentleman." *See, e.g., Holley v. United States*, 1997 WL 592487 (Fed. Cir. Sept. 19, 1997) (upholding discharge of officer for taking drugs and contaminating sample for drug test). Conduct "unbecoming an officer and a gentleman" may even comprise speech. *See, e.g., Parker*, 417 U.S. at 738 (noting that Levy was also convicted for "wrongfully and dishonorably" making statements provoking disloyalty). The question is whether that is the substantial governmental interest that motivated Congress in this case. As the Supreme Court stated in *Turner Broad. Sys.*:

> That the Government's asserted interests are important in the abstract does not mean, however, that the

> must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

512 U.S. at 664 (citations omitted).

As the district court found, there is no evidence on the record "to show that the actual sale or rental of sexually explicit material—as opposed to its possession—causes the alleged harm to the military's core values and appearance to the civilian world." On appeal, the government urges us to accept the mere possibility that military personnel might view sale of lascivious materials as official endorsement of such materials. Besides the fact that there is no evidence that this "risk" of perceived official endorsement is real, it defies common sense. Prior to the Act, local exchanges were directed to "[s]elect magazines based on merchandising considerations like consumer demand [and] shelf space." EOP Procedures, 40-11, Special Retail Programs, Chapter 10, § 10-2. Thus, the magazine selection reflect the views of the military personnel, not that of the government. Additionally, the military exchanges also sell alcohol and tobacco, and there is no suggestion that the military is regarded as endorsing drinking or smoking. And if the military still remained genuinely concerned about the mere possibility of the appearance of approval, it could easily place a sign above the materials stating that "The Military Disapproves The Sale Of All Sexually Explicit Material Depicting Nudity In A Lascivious Way." [10]

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[10] The majority also points to the military's interest as an employer in "disassociating itself from sexually explicit material," ante at ——. While I do not doubt that an employer, including the

The majority's concern that "if sparseness of legislative history were a basis for invalidation of acts of Congress, a wide swath of legislation could fall before the judicial axe," ante at ——, is overstated. Clearly, lack of legislative history is not a basis on which to strike down an Act of Congress. In the first place the purpose of many legislative enactments and the manner in which the legislation furthers the purpose are obvious from their text. Furthermore, not every Act of Congress trammels on constitutional rights. When a legislature interferes with constitutional rights, however, it is neither unreasonable nor contrary to authority to require some sort of legislative determination that the infringement of the constitutional right was necessary to further the government interest advanced. *See, e.g., Sable Communications,* 492 U.S. at 129-30 (holding that a ban on indecent telephone messages violated the First Amendment, and noting that "aside form conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations might prove to be"); *Reno v. ACLU,* 1997 U.S. LEXIS 4037, at *24 n.24 (Jun. 26, 1997) (holding that the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act of 1996 violated the First Amendment, the Court pointed to the fact that "[n]o hearings were held on the provisions that became law."). *Cf. Giano v. Senkowski,* 54 F.3d 1050, 1058-62 (2d Cir. 1995) (Calabresi, J., dissenting).

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government, could prohibit the display of sexually explicit material in a working environment so pervaded with discriminatory harassment as to alter the conditions of employment and create an abusive working environment, *see Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67 (1986), the government did not come forward with any evidence that the military constitutes a hostile environment, and, even if it did, the Act does nothing to prohibit the display of such material.

In this case, the government simply advances post-hoc rationalizations which find no support in Congressional history or military consideration. To rely on the mere fact that a statute has been enacted as evidence of congressional judgment on the issue addressed in the Act, and assert that a court should give deference to that judgment because it involves a matter of military concern, would mean that no regulation in the military context that infringes on constitutional rights would ever be struck down. Enactment of the legislation would be sufficient by itself to support its validity. If this is "deference to congressional choice," *Rostker*, 453 U.S. at 67, then we have failed to heed the Supreme Court's warning that "deference does not mean abdication," *id.* at 70, and have failed to fulfill "our ultimate responsibility to decide the constitutional question," *id.* at 67, and to protect the liberties which our Constitution guarantees. I, therefore, respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 CV 7525 (SAS)

GENERAL MEDIA COMMUNICATIONS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., and VIDEO SOFTWARE DEALER ASSOCIATION,
Plaintiffs,

- v. -

WILLIAM J. PERRY,
in his official capacity as the Secretary of Defense,
and the DEPARTMENT OF DEFENSE,
Defendants.

AMENDED OPINION AND ORDER

Shira A. Scheindlin, U.S.D.J.:

Plaintiffs bring this action to obtain an Order from this Court declaring the Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), unconstitutional and enjoining defendants from enforcing its terms. For the reasons set forth below, I find the Act violates the First and Fifth Amendments. Accordingly, plaintiffs' request for injunctive relief is granted.

I. INTRODUCTION

Contrary to the arguments of the parties, this case is not about sex or core values. It is a case about pornog-

raphy, and whether the Constitution protects plaintiffs' right to distribute it in military exchanges.[1] Whether one likes or approves of pornography, however, is not the issue. In a diverse and democratic society, we tolerate a vast range of discourse, much of it in bad taste and offensive. Our historical decision to elevate the right of free speech above often valid and competing interests has, at times, come at a high price to our communal values and culture. Permitting hatemongers to march in Skokie or to burn crosses in St. Paul surely is not behavior of which the vast majority of Americans approves. Similarly, public flag burning, pornographic movies, or nude dancing are activities that do not reflect the dominant cultural values in American society. Yet these activities are among those that have enjoyed some measure of constitutional protection.[2]

The dilemma we face when the right to free speech conflicts with the equally compelling wish to silence those who demean others with sexist, racist, and otherwise outrageous speech is often a stark one . When balancing these two interests, however, the former must prevail. While the majority of Americans may wish to ban pornography, in the final analysis, society is better served by protecting our cherished right to free speech, even at the cost of tolerating speech that is outrageous, offensive, and de-

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[1] "Pornography" has been defined as "a depiction of licentiousness or lewdness" and "a portrayal of erotic behavior designed to cause sexual excitement". Webster's Third New International Dictionary 1767 (1993). The Military Honor and Decency Act bans the sale or rental of "lascivious" portrayals of nudity, which implementing regulations define as those that are "lewd" and "intended or designed to elicit a sexual response."

[2] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (hate-mongers); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (cross burning); *Hustler Magazine v. Falwell*, 483 U.S. 1018 (1987) (advertisement parody of religious figure); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981) (pornographic movies); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (nude dancing).

meaning. There is no question that the result of permitting such speech is often unfortunate and unpleasant. But our Constitution has effectively protected us for over two centuries from living in a society where the government intrudes on our individual rights by deciding what consenting adults can read or view. As Judge Learned Hand once eloquently expressed, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). In the context of our long and rich First Amendment tradition, it becomes clear that sexually explicit material cannot be banned from sale or rental at military exchanges merely because it is offensive.

II. FACTUAL AND PROCEDURAL BACKGROUND

Title 10 of the United States Code, Section 2489a, originally titled the "Military Honor and Decency Act of 1996," was added to the National Defense Authorization Act For Fiscal Year 1997 (Pub. L. 104-201) without debate on May 1, 1996. Signed by President Clinton on September 23, 1996, the Act became effective on December 22, 1996, and provides in pertinent part:

> Sec. 2489a. . . . (a) PROHIBITION OF SALE OR RENTAL.—The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.
>
> (b) PROHIBITION OF OFFICIALLY PROVIDED SEXUALLY EXPLICIT MATERIAL.—A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.

> (c) REGULATIONS.—The Secretary of Defense shall prescribe regulations to implement this section.
>
> (d) DEFINITIONS.—In this section: (1) The term 'sexually explicit material' means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

10 U.S.C. § 2489a. Pursuant to Section 2489a(c), defendants issued implementing regulations that also became effective on December 22, 1996. *See* Declaration of Daniel S. Alter, Assistant U.S. Attorney, dated December 9, 1996 ("Alter Dec."), Ex. A. at 2. These regulations define "lascivious" to mean "[l]ewd and intended or designed to elicit a sexual response." *Id.*

The Act only bans the sale or rental of "sexually explicit" material on military property. It does not restrict the possession of such material on military property. Additionally, military personnel are free to buy "sexually explicit" material off military property or to order it through the mail. Military personnel may also share the same material with their colleagues so long as they do not sell or rent it.[3]

Plaintiff General Media Communications publishes various periodicals including *Penthouse*. The other plaintiffs

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[3] Some House members, however, appear to disapprove of the presence of this material on military bases altogether. One of its sponsors, Representative Robert Dornan, believes *Penthouse* and like materials are "a frontal, direct, vicious specific assault upon women . . . . cheapening [them] down like slavery to a product, meat on a rack." *See* 142 Cong. Rec. H8824 (July 24, 1996). Representative Dornan has stated that the Act "helps the Navy to tell these guys, stop putting these graphic, gynecological exam shots up on the walls of the carrier hanger deck. Stop that. . . . [The Act] helps commanders to take that, not puritanical, but strong, manly, decent line, or if it is a female officer, an ethically womanly line, to not have this garbage up." *Id.*

are various trade associations whose members are engaged in the wholesale and retail distribution, sale and manufacture of periodicals, books, sound recordings and home videos throughout the nation. Plaintiffs allege that the Act infringes their rights to free speech and equal protection of the laws, in violation of the First and Fourteenth Amendments, respectively. In addition, they allege that the Act is unconstitutionally vague in violation of the Fifth Amendment.

Penthouse is the third most popular magazine sold by Army and Air Force Exchanges, with sales of approximateyl 19,000 copies per month.[4] *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction ("Plaintiffs' Memo") at 4. The January 1997 issue of *Penthouse* is 222 pages. The magazine contains a number of articles by prominent authors such as Ben Stein and Alan Dershowitz. More than 97 pages include pictures of women, many of whom are totally nude. A substantial number of these pictures reveal female genitalia and women engaged in sexual contact with other women. There can be no dispute that these depictions of women are designed to elicit a sexual response. It also is fair to say that many of these pictures offend commonly shared ideals of decency because of their explicit nature.[5]

On October 18, 1996, plaintiffs filed an Amended Complaint seeking injunctive and declaratory relief from the Act pursuant to 28 U.S.C. §§ 1331 and 2201. On December 20, 1996, this Court issued a Temporary Restrain-

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[4] By comparison, *amici curiae* Playboy Enterprises, Inc. et al. ("Amici") sell an average of over 25,000 copies per month of *Playboy* magazine in *all* military exchanges. Amici also state that they distributed almost 20,000 videotapes through the exchange system in the first eight months of 1996. *See* Brief of *Amici curiae* in Support of Motion for Preliminary Injunction at 5.

[5] At least one issue of *Penthouse* has been held to be legally obscene. *See Penthouse Int'l Ltd. v. McAuliffe*, 610 F.2d 1353, 1372-73 (5th Cir.) (finding that the January 1978 issue of *Penthouse* was legally obscene), *cert. dismissed*, 447 U.S. 931 (1980).

ing Order enjoining defendants from enforcing the Act until decision of plaintiffs' motion. Oral argument was heard on December 31, 1996. On January 13, 1997, the parties agreed to treat plaintiffs' motion for a preliminary injunction as one for a permanent injunction.

III. DISCUSSION

A. *Legal Standard for Granting Permanent Injunctive Relief*

To succeed in an action for permanent injunctive relief, plaintiffs must establish (1) success on the merits of their claims; (2) irreparable harm absent injunctive relief; (3) that the threatened injury to plaintiffs outweighs any harm the injunction may cause to defendants; and (4) that the injunction is not adverse to the public interest. *See E.E.O.C. v. Local 40, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 76 F.3d 76, 80 (2d Cir. 1996) (citing *Roberts v. Madigan*, 702 F. Supp. 1505, 1514 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992)).

Provided that plaintiffs succeed on the merits of their claims, plaintiffs easily meet the remaining three elements of this test. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996). Generally, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary." 11A Charles A. Wright, Arthur R. Miller and Mary Kane, Federal Practice and Procedure § 2948.1 at 161 (2d ed. 1995). The defendants cannot claim they will be harmed by an injunction if the Act is unconstitutional, or that the enforcement of an unconstitutional statute best serves the public interest. Thus, if plaintiffs succeed on the merits of their claims, they are entitled to permanent injunctive relief.

B. *The First Amendment*

It is well established that the government may restrict *obscene* speech and expressive conduct. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992); *Miller v. California,* 413 U.S. 15, 24 (1973).[6] The government concedes, however, that the terms of the Act extend beyond obscene material. *See* Transcript of Oral Argument ("Tr.") at 33. This case, therefore, presents the question of whether Congress may restrict the sale or rental of *nonobscene* speech in a military exchange on the ground that it is "lascivious", which is defined by the implementing regulations to mean "lewd and intended or designed to elicit a sexual response."

1. Visual Images are "Speech" for First Amendment Purposes

Visual images are among the myriad forms of expressive conduct shielded by the First Amendment. *See Bery,* 97 F.3d at 695 ("As the Supreme Court has reminded us, visual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind.' *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 632 (1943). . . . One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that

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[6] *Miller* defined the test for determining whether material is obscene:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin,* [408 U.S. 229, 230 (1972)], quoting *Roth v. United States,* [354 U.S. 476, 489 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24.

was is not heroic."). Visual images are not stripped of First Amendment protection because they express sexual messages and ideas. *See Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). And although the government may proscribe obscenity, even this kind of speech is not entirely invisible to the First Amendment. *See R.A.V.*, 505 U.S. at 383 (citing *Roth v. United States*, 354 U.S. 476 (1957)). Obscene materials, for example, may not be restricted on the basis of particulary unpopular viewpoints, ideas or perspectives. *See id.* at 388.

2. Speech May Not Be Restricted Simply Because It Offends

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing, *inter alia, Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 72 (1983) *Carey v. Brown*, 447 U.S. 455, 462-463 (1980); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745-746 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970)). Restrictions on nonobscene speech based on offensiveness alone are repugnant to the First Amendment for at least two fundamental reasons. First, there is no constitutionally acceptable way to distinguish offensive speech from inoffensive speech: "[O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and

style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971) (offensive speech such as a jacket bearing the words "Fuck the Draft" is protected by the First Amendment). Second, banning nonobscene offensive speech restricts protected expression based on the message it conveys. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court held that visual depictions of nudity at a drive-in may not be banned on the ground that they might offend passersby. *Erznoznik* involved a city ordinance that criminalized the exhibition of nonobscene visual depictions of "human male or female bare buttocks, human female bare breasts, or human bare pubic areas" if such depictions were "visible from any public street or public place." *Id.* at 207. In ruling that the ordinance violated the First Amendment, the Supreme Court stated:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

Id. at 209 (citations omitted). Thus, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by avert-

ing [his] eyes.' " *Id.* at 210-11 (citations omitted).[7] *Erznoznik* directly contradicts the government's assertion that nonobscene sexual expression may be restricted on the basis of offensiveness. If the government may not ban the public display of nonobscene speech on the ground that it is offensive, it stands to reason that the government may not ban the sale or rental of the same material on similar grounds.[8]

3. The Act Restricts Only Offensive Portrayals of Nudity

By its terms, the Act only proscribes the sale and rental of material that depicts nudity "in a lascivious way". 10 U.S.C. § 2489a(d). As noted above, the implementing regulations define "lascivious" depictions of nudity as those that are "lewd" and "designed or intended to elicit a sexual response." Alter Dec., Ex. A. at 2. In its motion papers and at oral argument, the government asserted that

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[7] The Supreme Court distinguished *Erznoznik* in *Pacifica* on the basis that the offensive material at issue in *Pacifica* intruded into the privacy of the home, whereas the offensive material in *Erznoznik* was displayed in public. "Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away." *Pacifica*, 438 U.S. at 749, n.27. The *Erznoznik* Court rejected *Pacifica*'s other rationale—the potential, indiscriminate exposure of children to offensive material—because a ban on the public display of *all* nudity, as opposed to the public display of sexually explicit nudity, was overbroad. *See Erznoznik*, 422 U.S. at 213. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Again, the context of public display in *Erznoznik* differed from that in *Pacifica*, where the Court expressed support for " 'parents' claim to authority in their own household.' " 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. at 639-640).

[8] The public display of offensive material offends unwilling viewers or listeners. The sale or rental of such material clearly applies to those who choose to view it.

"lewd" means "patently offensive," as used in the first prong of the *Miller* three-part test for obscenity.[9] *See* Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Govt. Memo") at 30; Tr. at 60-61. *See also Miller*, 413 U.S. at 25. Taken together, the statute and its implementing regulations prohibit the sale or rental on military property of material, the dominant theme of which may be deemed "patently offensive," if that material is presented in an audio recording, film or video recording, or a periodical with visual depictions. The Act does not apply to material containing portrayals of nudity that are not "lewd", and thus material that is not "patently offensive" may be sold or rented on military property.

4. The Government's Arguments in Defense of the Act

In an attempt to evade the principle that nonobscene speech cannot be restricted simply because its content is offensive, the government relies on two sets of Supreme Court decisions that have upheld restrictions on such speech in limited circumstances. These restrictions are confined to the context of indiscriminate public exposure, first in the broadcast media and second in schools. In *Pacifica*, the Court held the F.C.C. could regulate nonobscene but indecent and patently offensive radio broadcasts because of the special difficulties posed by the broadcasting medium. In particular, the Court observed that broadcast speech is "uniquely pervasive", can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." *See Pacifica*, 438 U.S. at 748-

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[9] *See* footnote 6, *supra*. The word "lewd" is commonly used to mean "vulgar", "lascivious", "indecent", or "salacious". *See Webster's Third New International Dictionary* 1303 (1993). For the purposes of this Opinion, however, I will accept the government's definition of "lewd".

49. *Pacifica* was expressly limited to the narrow context of broadcasting by *Sable Communications*, 492 U.S. at 127 (federal ban on indecent telephone messages violated the First Amendment). This rationale does not apply to military exchanges any more than it applies to a corner drug store.[10]

The government also relies on *Board of Education v. Pico*, 457 U.S. 853, 871 (1982), in which the Court held that a school board's decision to remove nonobscene books from the school library was constitutional only because it was based on the school board's judgment that such books interfered with the educational mission of the school. *Pico* expressly recognized, however, that if the school board "*intended* by their removal decision to deny respondents access to ideas with which [the school board] disagreed, and if this intent was the decisive factor in [the school board's] decision, then [they] have exercised their discretion in violation of the Constitution." *Id.* (italics in original). The government also cites *Bethel School District v. Fraser*, 478 U.S. 675 (1986), to support its defense of the Act. But again, *Fraser* permitted the regulation of nonobscene sexually explicit and offensive speech within the context of a school environment where the audience included young children. *Id.* at 685. Both *Fraser* and *Pico* apply only to the school environment, where it has been long recognized that First Amendment freedoms are not equal to those of adults in other settings. *See, e.g., Thomas v. Board of Educ., Granville Central School Dist.*,

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[10] Moreover, military exchanges world-wide cover the front panel of *Penthouse* and similar magazines when they are displayed for sale. This procedure was specifically designed to prevent children from being exposed to potentially offensive magazine covers. *See* Alter Dec., Ex. C at 10-2 (military directive on "Selection, Display and Selling of Adult-Oriented Materials). Thus, when sold at a military exchange, *Penthouse* does not intrude on the privacy of the home without prior warning, and is not displayed to young children.

607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) ("the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket"), *cert. denied*, 444 U.S. 1081 (1980).

Outside the narrow contexts of broadcast media and the school environment, the Supreme Court has never allowed the government to restrict nonobscene speech because it is "indecent", "vulgar" or "offensive". Quite to the contrary, the Supreme Court has recognized that such speech is protected by the First Amendment because it may communicate messages, ideas and perspectives that cannot be expressed otherwise. *See, e.g., Cohen*, 403 U.S. at 26 ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive intent of individual speech, has little or no regard for that emotive function, which, practically speaking, may often be the more important element of the overall message sought to be [communicated].").[11]

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[11] During oral argument, the government also relied on *R.A.V.* in support of its claim that Congress may restrict speech because it is offensive. This argument was framed in the context of viewpoint-based speech restrictions, which target not merely subject matter but particular views taken by speakers on that subject matter. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995). *See generally* Kent Greenawalt, *Viewpoints from Olympus*, 96 Colum. L. Rev. 697, 700 (1996) (distinguishing viewpoint discrimination from content discrimination)). The government argued that "[in *R.A.V.*] the Supreme Court said you could regulate obscenity according to degree of lasciviousness. Perforce, lasciviousness cannot be a viewpoint." Thus, the government asserted, it follows from *R.A.V.* that even nonobscene material may be proscribed on the basis of lasciviousness.

The government's interpretation of *R.A.V.* is simply wrong. By its own admission, the government acknowledges that *R.A.V.* applies to the very different category of obscene speech, which, as a category, is excluded from First Amendment protection. *See R.A.V.*, 505 U.S. at 388. Hence because the state may entirely ban obscenity, "no significant danger of idea or viewpoint discrimination

5. The Act Violates the First Amendment

Restrictions of protected speech are subject to different levels of judicial scrutiny depending on the kind of government property to which they are applied. Government-owned property has been divided into three categories for purposes of First Amendment analysis:

> (1) *traditional public forums*, which 'by long tradition or by government fiat have been devoted to assembly and debate,' *Perry Education Ass'n v. Perry Local Educators' Ass'n*, [460 U.S. 37, 45 (1983)], including such areas as public streets, parks and sidewalks; (2) *public forums by government designation* that are state-created and opened for limited public use, for example, university meeting facilities and municipal theatres; and (3) *nonpublic forums* which, by tradition or design, are not appropriate platforms for unrestrained communication—military installations and federal workplaces, for instance, fall into this category. *Id.*

Paulsen v. County of Nassau, 925 F.2d 65, 68-69 (2d Cir. 1991). In either category of public forum, content-based government restrictions on speech are subjected to strict scrutiny and must be shown to effectuate a compelling state interest with the least restrictive available means. *See Perry Educ. Ass'n*, 460 U.S. at 46. In nonpublic fora, however, content-based restrictions are held to a less strict reasonableness standard, and "[i]t is sufficient that rules reflect a legitimate government concern and do not suppress expression merely because public officials oppose the speaker's view." *Paulsen*, 925 F.2d at 69 (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

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exists . . . if [the] State . . . choose[s] to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity." *Id.* This rationale does not apply to offensive, nonobscene material, which the state cannot ban in the first instance.

I need not determine whether military exchanges are public or nonpublic fora. Even in a nonpublic forum, statutory restrictions on nonobscene speech must be based on a legitimate government interest. Because the purpose of the Act is to ban expression that is lewd—under the government's plain meaning interpretation of the Act, expression that is "patently offensive"—and because the First Amendment prevents the government from banning material solely because it is offensive, the Act is unconstitutional whether a military exchange is a public or nonpublic forum.[12]

The government argues that the Act is intended to maintain the "appearance of honor and propriety and professionalism which the military seeks to establish in the community, and in the country and in the world at large." Tr. at 38. The government also contends the Act is based on Congress' determination that the sale or rental of sexually explicit materials "jeopardized the military mission of promoting core values" such as "honor, courage and commitment". Govt. Memo at 17-18. By removing *Penthouse* and like material from the military exchanges, the government asserts, military personnel will be more likely to "exemplify the ultimate in ethical and moral behavior." *Id.* at 18.

The determination of the Act's purpose must begin, of course, with the language of the Act itself. Only when a court is faced with unavoidably ambiguous statutory wording should it look behind the words themselves to legislative history in an attempt to reconstruct their purpose. *See United States v. R.L.C.*, 503 U.S. 291, 298 (1992); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 35-96 (1951) (Jackson, J., concurring). As discussed above, a plain reading of the Act shows that it

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[12] The Act is a content-based speech restriction that would be subject to strict scrutiny in either type of public forum, but would be held to the less strict reasonableness standard in a nonpublic forum. *See Rosenberger*, 115 S. Ct. at 2517.

proscribes only those portrayals of nudity that are "lascivious". The term "lascivious" in turn is claimed to mean "patently offensive". Thus, the Act on its face bans protected speech on the basis of its offensiveness alone.

The government asserts that a plain meaning interpretation of the Act leads to the conclusion that the statute's purpose is to promote military core values and improve the public perception of the military. Arguing that magazines such as *Penthouse* are "unpalatable to many", the government contends that its sale and rental in military exchanges might be interpreted as an official endorsement of the material published therein. *See* Govt. Memo at 18 (both military personnel and the public at large might reasonably believe that sexually explicit vulgarity sold at the base exchange bears the commander's formal blessings"). This argument is unpersuasive for several reasons. First, the Act does nothing whatsoever to reduce the actual presence of sexually explicit material on military property and there is no evidence to show that the actual sale or rental of sexually explicit material—as opposed to its possession—causes the alleged harm to the military's core values and appearance to the civilian world. Second, unless supported by Congressional findings of fact, it is unreasonable to equate the sale or rental of sexually explicit material in military exchanges with an official "endorsement". Military exchanges sell those products that are popularly demanded by military personnel, even products that may be harmful to those who buy them. It is common knowledge, for example, that alcohol and cigarettes are available in most military exchanges.

Rather, a plain reading of the Act leads inevitably to the conclusion that it was drafted in an attempt to limit the sale and rental of nonobscene speech that Congress believed to be offensive and to penalize those who publish it by preventing its sale to military exchanges. I have no quarrel with the observation that these materials are offensive—in fact, I agree that they are. But, as noted

earlier, "[one person's] vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. As the cases cited above in Section III(C) clearly establish, our Constitutional tradition does not allow Congress to restrict protected speech because it finds the ideas, messages or perspectives expressed therein to be offensive, vulgar or indecent. I therefore find the Act violates the First Amendment.

C. *The Equal Protection Clause*

Statutory classifications that burden a First Amendment right face strict scrutiny under the Equal Protection clause of the Fourteenth Amendment.[13] *See Mosley*, 408 U.S. at 96 ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). *See also Carey*, 447 U.S. at 461-462; *Bery*, 97 F.3d at 699. Under equal protection strict scrutiny analysis, such a statutory classification is unconstitutional unless the government can prove that it is necessary to promote a compelling government interest. *See Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996) (citing *Heller v. Doe*, 509 U.S. 312 (1993)). *See also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (citing, *inter alia*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). Furthermore, the government must show that the statutory classification furthers that compelling interest with the least restrictive means available. *See Bernal v. Fainter*, 467 U.S. 216,

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[13] The Fourteenth Amendment does not apply to the federal government. However, the Supreme Court has long recognized that discriminatory classifications by the federal government may violate the Due Process clause of the Fifth Amendment. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal law allowing only male members of armed forces automatic dependency allowance violates Fifth Amendment Due Process clause); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates Fifth Amendment Due Process clause).

219 & n.6 (1984) (also noting that "[o]nly rarely are statutes sustained in the face of strict scrutiny.").

While the Supreme Court has afforded Congress great deference in the area of military affairs, it is also true that Congress does not operate free of all constitutional restraint when legislating in this area. *See Rostker v. Goldberg*, 453 U.S. 57, 64-65, 67 (1981). Citizens do not jettison their Constitutional rights simply by enlisting in the armed forces, and restrictions on the First Amendment rights of military personnel are subject to strict scrutiny. *See Thomas v. Board of Educ.*, 607 F.2d at 1049 (even in the military context, "the Constitution requires governmental authorities to permit the maximum degree of unrestrained expression consistent with the maintenance of institutional integrity"). Thus, the Supreme Court has allowed restrictions of First Amendment rights in the military context only when such restrictions were deemed necessary to thwart "a clear danger to military loyalty, discipline or morale". *Brown v. Glines*, 444 U.S. 348, 355 (1980). *See also Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding military requirement of a uniform dress code as essential aspect of military discipline); *United States v. Albertini*, 472 U.S. 675 (1985) (upholding regulation that authorized commanders to permanently exclude from military base civilians who had vandalized military property as threat to preparedness and security); *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding conviction of a commissioned officer for conduct unbecoming an officer where, while in uniform, he publicly urged enlisted personnel to resist orders and protest the Vietnam War). *Cf. Flower v. United States*, 407 U.S. 197 (1972) (reversing conviction for unauthorized reentry upon military reservation where defendant had been ordered off reservation for distributing leaflets). Under the Equal Protection clause, a statutory classification that burdens a soldier's rights of free expression must face the same strict scrutiny test as

any other classification that impinges upon a fundamental right. *See, e.g., Rostker,* 453 U.S. at 71 (classifications face same test in military context as elsewhere, although courts should defer to "congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance").

The Act creates classifications by banning the sale or rental of sexually explicit material that is presented in audio tapes, periodicals, and films but not sexually explicit material that is presented in books. Thus, the Act distinguishes between the nude photographs in *Penthouse* and those in Madonna's book entitled *Sex* simply because one is a periodical and the other is a hard-cover publication. Furthermore, the Act distinguishes between written and visual forms of expression, and proscribes only the latter. For example, the sale or rental of erotic literature would not be banned as long as it contained no visual images. By treating one form of publishing ideas differently than another, the Act invites strict scrutiny. *See, e.g., Bery,* 97 F.3d at 696, 699 (ordinance that distinguished between written and visual expression in a manner that effectively banned only one created a classification that required strict scrutiny under the Equal Protection clause).

Even were I to accept the government's claims with regard to the Act's purpose, which I do not for reasons explained above, the Act could not withstand strict scrutiny. There are no Congressional findings of fact and no evidence on the record before the Court that suggests the Act's classification is necessary to achieve Congress' alleged goals of maintaining "the appearance of honor, propriety and professionalism" and "promoting core values". Given the tremendous popularity of *Penthouse* and *Playboy* among military personnel, nothing indicates that the Act will reduce the presence of sexually explicit material on military property. Common sense indicates that publishers could evade the Act simply by selling hard-cover "books" instead of "periodicals" without changing the ma-

terial published therein. Moreover, the government has presented no facts to indicate that visual versus written erotica furthers the government's asserted purpose for passing the Act. Because the Act's classifications do not further a permissible, let alone compelling state interest, and because the means the government has chosen to further that interest are not narrowly tailored, the Act violates the Equal Protection Clause.

D. *Vagueness*

Plaintiffs also claim the Act is vague in violation of the Due Process clause of the Fifth Amendment.[14] The standards for evaluating statutory vagueness were set forth in *Grayned v. City of Rockford*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

408 U.S. at 108-109. The Supreme Court has also stated that these standards should not be mechanically applied. Thus, "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Villages of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). For example enactments with civil rather than criminal penalties

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[14] At least one commentator has argued that the First Amendment vagueness doctrine is distinct from the Fifth Amendment vagueness doctrine, and should be understood as a subpart of the First Amendment overbreadth doctrine. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 903 (1991).

are given more leeway because the consequences of imprecision are less severe. *See id.* at 498-499. However, *Hoffman* also expressly stated that "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or association, a more stringent vagueness test should apply." *Id.* at 499 (citing *Papacristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972) (vagrancy ordinance is void for vagueness because it encourages erratic and arbitrary arrests and places almost unfettered discretion in hands of the police) and *Grayned,* 409 U.S. at 109).

As discussed above in Section III(C), government restrictions on offensive speech are inherently problematic because of the difficulty in distinguishing offensive from inoffensive speech in an objective manner. *See Cohen,* 403 U.S. at 25. In the instant case, the government has conceded that the term "lascivious" as it is used by the Act contains a subjective element. Tr. at 32-33. In this nation's pluralistic society, tastes and standards relating to the portrayal of nudity vary greatly from person to person. What one person may find to be a "lascivious" portrayal of nudity may be inspiring art to another. *See American Civil Liberties Union v. Reno,* 929 F. Supp. 824, 856 (E.D. Pa. 1996) (terms "indecent" and "patently offensive" as used by the Communications Decency Act of 1996 are "inherently vague"). *But see Shea ex rel. American Reporter v. Reno,* 930 F. Supp. 916, 935 (S.D. N.Y. 1996) (finding terms of Communications Decency Act codified the FCC definition of indecency and thus were not void for vagueness), *petition for cert. filed,* 65 U.S.L.W. 3323 (Oct. 15, 1996) (No. 96-595). The "Review Board" established by the Act's implementing regulations [16] does not cure this defect, for there is no reason

[16] The regulations direct the defendants to establish a Resale Activities Board of Review ("Review Board"), which is to include a

to believe that military officers will be more adept at identifying exactly what constitutes a "lewd" portrayal of nudity than any other government official.

By allowing the scope of the Act's ban on the sale or rental of portrayals of nudity to change according to each government official's distinction between what is "patently offensive" and what is not, Congress has created the real danger of *ad hoc*, arbitrary interpretation and application of the law. Worse yet, Congress has given military officials the means to ban the sale or rental of disfavored speech and expressive conduct under the pretext that it is "patently offensive" in their judgment. *See, e.g., NAACP v. Button*, 371 U.S. 415, 435 (1963) ("[A] vague and broad statute lends itself to selective enforcement against unpopular causes.").

This risk impermissibly chills plaintiffs' First Amendment rights. It is true that plaintiffs cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their products. However, plaintiffs have a significant financial stake in their current access to shelf space in military exchanges.[16] If they are subject to a statutory prohibition of the sale or rental of "lascivious" portrayals of nudity, plaintiffs may well feel obliged to scale back their expressive conduct beyond constitutionally protected boundaries in order to maintain that access. Thus, irrespective of whether plaintiffs face the risk of direct punishment under the Act,

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senior representative from each of the military branches' exchange services. The Review Board has the authority and responsibility to periodically review material offered for sale or rental to determine whether such material is sexually explicit within the terms of the Act and implementing regulations. *See* Alter Dec., Ex. A at 3.

[16] For example, *amici* assert that *Playboy*'s military exchange sales represent approximately 2.7% of the magazine's total newsstand sales of its regular issues, and 3.6% of the magazine's total newsstand sales of its special editions. *See* Brief of *Amici curiae*, at 5.

the vagueness of its terms trespasses on plaintiffs' First Amendment rights.

IV. CONCLUSION

I am not unmindful that *Penthouse* and its ilk are offensive to many Americans' sense of decency. I am also aware of the military's recent difficulties involving incidents of sexual harassment and acts of violence against women. Yet if Congress wishes to restrict the sale or rental of expressive materials on military property, it must do so in a constitutionally acceptable manner. For example, Congress may choose to eliminate the sale and rental of all expressive material or all obscene material. For the foregoing reasons, I find the Act violates the First and Fifth Amendments. Accordingly, plaintiffs' request for permanent injunctive relief is granted, and it is hereby

ORDERED that, as of the date of this Opinion and Order, defendants, including their agents, servants, and employees (both military and civilian) shall be permanently restrained from changing, as a result of the Act, their existing stock, display and selling policies or practices with respect to materials that may be deemed subject to the Act.

So Ordered:

/s/ Shira A. Scheindlin
SHIRA A. SCHEINDLIN
U.S.D.J.

Dated: New York, New York
January 22, 1997

Amended: February 20, 1997

APPENDIX C

[Filed Feb. 3, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of February, one thousand nine hundred and ninety-eight.

Docket No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., and VIDEO SOFTWARE DEALERS ASSOCIATION,

Plaintiffs-Appellees,

v.

WILLIAM S. COHEN,
in his official capacity as Secretary of Defense,
and the DEPARTMENT OF DEFENSE,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard in banc* having been filed herein by the Plaintiffs-Appellees *General Media Communications, et al.*, and the panel that heard the appeal having filed an opinion on November 21, 1997,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC., *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM S. COHEN, *et ano.*,
Defendant-Appellant.

NOTICE OF MOTION FOR STAY OF MANDATE
PENDING PETITION FOR CERTIORARI

Plaintiffs request that an order be entered staying the issuance of the Second Circuit's mandate for 30 days and if a petition for Certiorari is filed during such period, until final disposition by the United States Supreme Court.

/s/ Michael A. Bamberger
MICHAEL A. BAMBERGER

Date February 6, 1998

ORDER

Before: Hon. Ralph K. Winter, Chief Judge, Hon. José A. Cabranes, Hon. Fred L. Parker, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

Date 2/13/98

FOR THE COURT:

GEORGE LANGE III
Clerk

By: /s/ Lucille Carr
LUCILLE CARR
Deputy Clerk

APPENDIX E

STATUTE INVOLVED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997 (P.L. 104-201) provides:

Sec. 343. Prohibition of Sale or Rental of Sexually Explicit Material.

(a) In General (1) Chapter 147 of title 10, United States Code, is amended by inserting after section 2489 the following new section: "2489a. Sale or rental of sexually explicit material prohibited

"(a) Prohibition of Sale or Rental. The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.

"(b) Prohibition of Officially Provided Sexually Explicit Material. A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.

"(c) Regulations. The Secretary of Defense shall prescribe regulations to implement this section.

"(d) Definitions. In this section:

"(1) The term sexually explicit material means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

"(2) The term property under the jurisdiction of the Department of Defense includes commissaries, all facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Navy

Resale and Services Support Office, Marine Corps exchanges, and ships stores.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2489 the following new item:

"2489a. Sale or rental of sexually explicit material prohibited.".

(b) Effective Date. Subsection (a) of section 2489a of title 10, United States Code, as added by subsection (a) of this section, shall take effect 90 days after the date of the enactment of this Act.

APPENDIX F

[DoD Logo]

Force Management
Policy

ASSISTANT SECRETARY OF DEFENSE
4000 Defense Pentagon
Washington, D.C. 20301-4000

December xx, 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE SECRETARY OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT:

DoD Directive-Type Memorandum—Sale or Rental of Sexually Explicit Material on DoD Property

Reference:

(a) DoD Directive 5025.1-M, "DoD Directives System Procedures", August 15, 1994

(b) Secretary of Defense Memorandum, Subject: Delegation of Authorities, November 14, 1996

(c) Under Secretary of Defense (Personnel and Readiness) Memorandum, Subject: Delegation of Authority and Assignment of Duties, December 6, 1996

(d) Public Law 104-201, section 343 (to be codified at Title 10, United States Code, Section 2489a)

(e) DoD Directive 1330.9, "Armed Services Exchange Regulations," December 15, 1986

A. PURPOSE

Pursuant to references (a), (b) and (c), this one-time Directive-Type Memorandum implements reference (d), consistent with reference (e), by providing guidance concerning restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the Department of Defense (DoD) or by members of the armed forces or DoD civilian officers or employees, acting in their official capacities.

B. APPLICABILITY

1. This Memorandum applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a service in the Navy), the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the DoD Inspector General, the Defense Agencies, and the DoD Field Activities.

2. This Memorandum shall not confer rights on any person.

C. DEFINITIONS

1. *Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

2. *Sexually Explicit Material.* Material the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

3. *Dominant Theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

4. *Lascivious.* Lewd and intended or designed to elicit a sexual response.

5. *Property Under the Jurisdiction of the Department of Defense.* Commissaries operated by the Defense Commissary Agency, facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Marine Corps exchanges, and U.S. Navy ships' stores (sometimes referred to collectively herein as "retail outlets"), excluding for the purposes of this Memorandum entities that are not instrumentalities of the United States.

D. POLICY

In implementing reference (c), it is DoD policy that:

1. No sexually explicit material may be offered for sale or rental on property under the jurisdiction of DoD, and no member of the armed forces, or DoD civilian officer or employee, acting in his or her official capacity, shall offer for sale or rental any sexually explicit material.

2. Material shall not be deemed sexually explicit because of any message or point of view expressed therein.

E. RESPONSIBILITIES

1. The *Assistant Secretary of Defense for Force Management Policy*, under the Under Secretary of Defense (Personnel and Readiness), shall:

(a) monitor and, as to DoD resale activities under the Assistant Secretary's authority, direction and control assure, compliance with this Memorandum;

(b) establish, and appoint a Chair of, the Resale Activities Board of Review (the "Board"), which shall also include a senior representative from each of the Army and Air Force Exchange Service, the Navy Exchange Service Command, and the Marine Corps exchanges.

2. The *Secretaries of the Military Departments* shall ensure that their respective component DoD resale activities comply with this Memorandum.

3. The *Resale Activities Board of Review* shall have the responsibilities set forth in section F of this Memorandum.

F. PROCEDURES

1. The Board shall have the authority and responsibility to periodically review material offered or to be offered for sale or rental on property under DoD jurisdiction, and to determine whether any such material is sexually explicit in accordance with this Memorandum. Within sixty (60) days of the issuance of this Memorandum, the Board shall undertake and complete an initial review of material that is offered for sale or rental on the date that this Memorandum becomes effective.

2. If the Board determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material shall be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers, and shall not be purchased absent further action by the Board.

3. Following its initial review pursuant to subsection F.1., above, the Board shall convene as necessary to determine whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit. The Board members shall, to the extent practicable, maintain and update relevant information

concerning material offered or to be offered for sale or rental on property under DoD jurisdiction.

4. If any purchasing agent or manager of a retail outlet has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined herein, and such material is not addressed by the Board's instructions issued pursuant to subsection F.5., below, he or she shall request a determination from the Board concerning such material.

5. At the conclusion of its initial review pursuant to subsection F.1., above, and thereafter from time to time as necessary, the Board shall provide instructions to purchasing agents and managers of retail outlets concerning the withdrawal and return of sexually explicit material. The Board may also provide instructions to purchasing agents and managers of retail outlets concerning material that it has determined is not sexually explicit. Purchasing agents and managers of retail outlets shall continue to follow their usual purchasing and stocking practices unless instructed otherwise by the Board.

G. EFFECTIVE DATE

This Directive-Type Memorandum shall become effective on December 22, 1996.

F. PANG
Assistant Secretary of Defense
(Force Management Policy)

Supreme Court, U.S.
FILED
MAY 18 1998
CLERK

No. 97-1535

In the Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 10 U.S.C. 2489a (Supp. II 1996), which restricts "the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," violates the First and Fifth Amendments.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1535

GENERAL MEDIA COMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 131 F.3d 273. The opinion of the district court (Pet. App. 45a-67a) is reported at 952 F. Supp. 1072.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1997. A petition for rehearing was denied on February 3, 1998. Pet. App. 68a-69a. The petition for a writ of certiorari was filed on March 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a facial constitutional challenge to 10 U.S.C. 2489a (Supp. II 1996), originally introduced as the Military Honor and Decency Act of 1996 (the Act), which prohibits the government from selling or renting "sexually explicit material" on military property. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 343, 110 Stat. 2489.[1] The Act defines "sexually explicit material" as "an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. 2489a(d)(1) (Supp. II 1996).[2]

The Act does not prohibit members of the armed forces from possessing sexually explicit material on military property. Nor does it prohibit members of the armed forces from buying sexually explicit material off military property or from ordering such

---

[1] The Act provides that "[t]he Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," 10 U.S.C. 2489a(a) (Supp. II 1996), and that "[a] member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person," 10 U.S.C. 2489a(b) (Supp. II 1996).

[2] The Department of Defense has elaborated on that definition in a Directive-Type Memorandum implementing the Act. Pet. App. 74a-78a. The memorandum defines "lascivious" to mean "[l]ewd and intended or designed to elicit a sexual response." *Id.* at 76a. The memorandum also provides that "[m]aterial shall not be deemed sexually explicit because of any message or point of view expressed therein." *Ibid.*

material for delivery by mail on military property. Pet. App. 6a.

The Act primarily operates to prevent the sale of sexually explicit material at military exchanges and other stores located on military property. 10 U.S.C. 2489a(d)(2) (Supp. II 1996). Those federal "nonappropriated fund instrumentalities," or NAFIs, exist "for the comfort, pleasure, contentment, and mental and physical improvement of the armed forces." 5 U.S.C. 2105(c).[3] Military exchanges and commissaries are not open to the general public. They are open only to military personnel, their dependents, and other affiliated persons upon the display of appropriate military identification. Pet. App. 12a; DOD Dir. 1330.9, §§ 2-101, 2-201, 2-301.

2. Petitioners are General Media Communications, Inc., which publishes *Penthouse* and other magazines, and various trade associations whose members produce, distribute, and sell magazines, books, sound recordings, and videos. Pet. App. 48a-49a. Before the Act became effective, petitioners brought this action against respondents, the Secretary of Defense and the Department of Defense, seeking a declaratory judgment that the Act violates the First and Fifth Amendments. They also sought an injunction against enforcement of the Act. Pet. 8-9.

The district court, observing that this case is "about pornography, and whether the Constitution protects plaintiffs' right to distribute it in military

---

[3] NAFI employees are civilian federal employees who are outside the civil service. 5 U.S.C. 2105(c); 10 U.S.C. 1587(a)(1). Commissaries may be operated by private persons, but procurement functions must be carried out by Department of Defense personnel. 10 U.S.C. 2482 (Supp. II 1996).

exchanges," held the Act to be unconstitutional on three grounds. Pet. App. 45a-46a.

First, the district court held that the Act violates the Free Speech Clause of the First Amendment. The court noted that the Act does not reach all sexually explicit material, but only that which is "lascivious"—a term that the government equated with the "patent[] offensive[ness]" prong of this Court's three-pronged obscenity definition. See Pet. App. 54a-55a (citing *Miller* v. *California*, 413 U.S. 15, 24 (1973)). But the court viewed the "patent offensiveness" limitation as rendering the Act more, not less, constitutionally problematic, relying on this Court's statements, in other contexts, that Congress cannot prohibit non-obscene speech merely because society may find it offensive. *Id.* at 52a-61a. The court concluded that, "[b]ecause the purpose of the Act is to ban expression that is * * * 'patently offensive' * * * and because the First Amendment prevents the government from banning material solely because it is offensive, the Act is unconstitutional." *Id.* at 59a. The court rejected the government's contention that the Act is justified as a means of enabling the military to promote such "core values" as honor, decorum, and professionalism, and of avoiding the appearance of official endorsement of sexually explicit vulgarity. *Id.* at 58a-59a.

Second, the district court held that the Act violates the equal protection component of the Fifth Amendment. The court, applying strict scrutiny, concluded that the government had not demonstrated a compelling justification for singling out the material reached by the Act from other sexually explicit material. Pet. App. 62a-64a.

Third, the district court held that the Act's definition of sexually explicit material was impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. The court concluded that "the term 'lascivious' as it is used by the Act contains a subjective element," and thus could be applied by government officials in an arbitrary or discriminatory manner. Pet. App. 65a-66a. The court conceded that petitioners "cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their products." *Id.* at 66a. But the court reasoned that the Act could indirectly influence petitioners' behavior, such as by causing them to "scale back their expressive conduct" so that their products could continue to be sold at military exchanges. *Ibid.*

After holding the Act unconstitutional under the First and Fifth Amendments, the district court permanently enjoined respondents "from changing, as a result of the Act, their existing stock, display and selling policies or practices with respect to materials that may be deemed subject to the Act." Pet. App. 67a. The court did not enjoin respondents from ceasing to stock, display, and sell sexually explicit materials for other reasons.

3. The court of appeals reversed. Pet. App. 1a-44a. The court acknowledged at the outset that "[t]he Constitution does not, of course, stop at the gates of a military base." *Id.* at 3a. But the court also recognized, as has this Court, that "the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Ibid.* (quoting *Parker* v. *Levy*, 417 U.S. 733, 744 (1974)).

a. The court of appeals concluded that the Act satisfies the appropriate First Amendment standard by "reasonably further[ing] legitimate governmental interests" without discriminating against particular viewpoints. Pet. App. 27a-28a.

The court rejected petitioners' assertion that newsstands at military exchanges are "public forums"—*i.e.*, areas reserved for expressive activity, whether by tradition or by governmental designation — where any content-based regulation of speech is subject to "the highest scrutiny." Pet. App. 8a-9a, 11a. The court instead concluded that such newsstands are "nonpublic forums," where even content-based regulations of speech "need only be reasonable," so long as they are not based on "disagreement with the speaker's view." *Id.* at 9a (quoting *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992)). The court noted that military exchanges, and consequently their newsstands, are not open to the general public. *Id.* at 12a. Nor has the government "offer[ed] to resell the merchandise of every producer, or every 'speaker,' who seeks access to th[e] shelves" of military exchange newsstands. *Id.* at 12a-13a.

The court next concluded that, while "[t]he Act assuredly distinguishes between permissible and impermissible speech on the basis of content, * * * it does not rise to the level of viewpoint discrimination." Pet. App. 14a. The court rejected, as "linguistic overreaching," petitioners' argument that the Act targets speech expressing "a *viewpoint* of 'lasciviousness,'" explaining that the Act's reference to "lasciviousness" was more sensibly viewed as identifying the content, not the viewpoint, of the material covered by the Act. *Id.* at 15a-16a; see *id.* at 16a (questioning

"how, for example, would one go about discussing and considering the political issues of the day from a lascivious viewpoint?"). The court found support for its position in this Court's observation in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), that distinctions among obscene materials based on "prurience" or "lascivious[ness]" would not constitute impermissible viewpoint discrimination. Pet. App. 16a.

The court further concluded that the Act was a "reasonable" restriction on speech in the military context—a context in which particular deference is due the judgments of the political branches. Pet. App. 17a-18a (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). The court reasoned that the government has a legitimate interest in "ending the military's involvement in the sale of sexually explicit materials," in order to avoid "sending a message that the military approves of or endorses these materials," and thereby to "promote[] military honor, professionalism, proper decorum, and military 'core values.'" *Id.* at 19a-21a.

b. The court of appeals also rejected petitioners' argument that the Act violates the equal protection component of the Fifth Amendment by restricting the sale and rental of only certain categories of sexually explicit material (*e.g.*, magazines but not books, visual forms of lascivious expression but not verbal ones). Pet. App. 22a-24a. The court explained that the Act's distinctions among types of sexually explicit material "need only survive rational-basis analysis," because the Act does not restrict speech in a public forum, as did the regulations in *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), or otherwise violate the First Amendment. Pet. App. 23a. The court determined that "Congress could rationally have concluded that

[military] exchanges do not trade extensively in books containing sexually explicit material and that, consequently, it was unnecessary to include books under the Act's prohibition," and that "visual forms of lascivious expression are more prevalent, more likely to be noticed, or more provocative than written materials, and that accordingly there was a greater need to regulate such materials." *Ibid.*

c. The court of appeals finally held that the Act was not impermissibly vague under the Due Process Clause of the Fifth Amendment. Pet. App. 24a-27a. The court recognized that a statute that imposes only civil penalties—or, as here, "no penalties at all"—need not be drafted with the same precision as a criminal statute. *Id.* at 25a (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); *Winters* v. *New York*, 333 U.S. 507, 515 (1948)). The court also recognized that Congress is allowed "greater flexibility" in drafting statutes governing the military. *Id.* at 25a (quoting *Parker*, 417 U.S. at 756). The court concluded that, "[m]easured by these guideposts," any arguable vagueness or ambiguity in the Act was "constitutionally tolerable." *Id.* at 26a. It further noted that this Court had rejected as "insubstantial" a claim that the term "lascivious" was unconstitutionally vague even in a criminal statute. *Ibid.* (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994)).

d. Judge Parker dissented on the First Amendment issue. Pet. App. 29a-44a. He did not address the question whether a military exchange is a public forum (*id.* at 33a n.3), because he concluded that the Act's restrictions on lascivious expression constitute viewpoint discrimination (*id.* at 33a), and thus are subject to the same heightened scrutiny even in a

nonpublic forum (*id.* at 36a). He asserted that "[p]ortrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination." *Id.* at 33a.

Applying an intermediate scrutiny standard, Judge Parker concluded that the Act is not "reasonably necessary to protect [a] substantial government interest," and thus violates the First Amendment. Pet. App. 38a-39a (quoting *Brown* v. *Glines*, 444 U.S. 348, 358 (1980)). He based that conclusion primarily on the absence of affirmative "evidence" in the Act's text or legislative history that Congress did, in fact, determine that the sale or rental of sexually explicit material undermines military values by implying an official endorsement of such material. *Id.* at 40a-44a.

e. On February 6, 1998, the court of appeals granted petitioners' motion to stay the issuance of the mandate pending the disposition of any petition for certiorari. Pet. App. 70a-71a. The Act has consequently never been enforced.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. The court of appeals properly reviewed 10 U.S.C. 2489a (Supp. II 1996), the Military Honor and Decency Act of 1996 (the Act), with deference to Congress's preeminent authority over the military. See Pet. App. 17a-18a. Congress is empowered by the Constitution "[t]o raise and support Armies," U.S.

Const. Art. I, § 8, Cl. 12, "[t]o provide and maintain a Navy," *id.*, Cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.*, Cl. 14. "It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment." *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983). The courts consequently "give Congress the highest deference in ordering military affairs" pursuant to those constitutional powers. *Loving* v. *United States*, 116 S. Ct. 1737, 1748 (1996); accord *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981) ("judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged").

This Court has taken a deferential approach to constitutional challenges arising in the military context. See, *e.g.*, *Loving*, 116 S. Ct. at 1748 (separation of powers); *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (due process); *Solorio* v. *United States*, 483 U.S. 435, 447-448 (1987) (court-martial jurisdiction, Fifth Amendment); *Goldman* v. *Weinberger*, 475 U.S. 503, 509-510 (1986) (free exercise); *Chappell*, 462 U.S. at 301 (equal protection); *Rostker*, 453 U.S. at 70 (equal protection); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974) (free speech); see also *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976) (concluding that military base was not First Amendment public forum for expressive activity); *id.* at 843-844 (Powell, J., concurring) ("civilian expression in the domain of the military" must be addressed in context of its "functional and symbolic incompatibility with the 'specialized society separate

from civilian society,' that has its home on the base") (quoting *Parker*, 417 U.S. at 743).

2. Petitioners principally contend (Pet. 12-19) that the court of appeals erred in holding that the Act does not involve the regulation of speech in a public forum. They argue (Pet. 14) that newsstands and bookstores in military exchanges are designated public fora, in which the government may regulate the content of speech only with a compelling justification and by the least intrusive means. Petitioners' position is flawed for two reasons: It is doubtful that "forum" analysis applies at all in this context. And, in any event, the newsstands and bookstores of military exchanges are, at most, nonpublic fora, as the court of appeals held. Pet. App. 8a-13a.

a. This Court has recognized that "the public forum doctrine should not be extended in a mechanical way" to "very different context[s]." *Arkansas Educ. Television Comm'n* v. *Forbes*, No. 96-779 (May 18, 1998), slip op. 5. The Court has applied "forum" analysis only in the context of "restrictions that the government seeks to place on the use of its property," *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992), where such restrictions would prevent private individuals from using that property to engage in expressive activity. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (student religious group seeking access to public university's student activities fund); *International Soc'y for Krishna Consciousness*, 505 U.S. at 679-683 (religious solicitors seeking access to public areas of airline terminal); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (rival teachers union seeking access to school mail system).

The Act, by contrast, does not restrict any private individual from using government property to engage in expressive activity. Nothing in the Act prohibits individual service members from possessing, circulating, displaying, or discussing "sexually explicit material" anywhere on a military base. Nor does the Act prohibit petitioners (or their members) from selling such material by mail, telephone, or the internet to individual service members who reside on a military base. The Act simply regulates the government's *own* activity as the proprietor of military exchanges—specifically, its decisions about which magazines, films, and audio and visual recordings to purchase for resale to service members. It is thus wholly unlike those government restrictions on private expressive activity that this Court has subjected to "forum" analysis. Cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (city council's action, "in a proprietary capacity," permitting only commercial advertising, and not political advertising, on its transit cars need only be "reasonable" to satisfy First Amendment); *United States* v. *Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (recognizing that "a lower level of First Amendment scrutiny" applies when the government is acting "as proprietor, to manage [its] internal operation[s]") (internal quotation marks omitted).[4]

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[4] Contrary to petitioners' suggestion (Pet. 18 n.13), whether the decision not to sell "sexually explicit material" at military exchanges was made by Congress, as opposed to the business managers of the military exchanges, is of no legal consequence. Congress can establish federal procurement policy by statute under its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14; see *Lehman*, 418 U.S. at 300-301, 304

It is inherent in the operation of any retail establishment that the proprietor continually makes choices as to which products are to fill its limited shelf space, whether those products are magazines, sneakers, or toothpaste. Those choices often involve the sorts of considerations that have no place in "forum" analysis. For example, while the government, in its administrative capacity, may not decide which groups receive permits to parade on a public street based on the popularity of their message, petitioners concede (Pet. 17) that the government, in its proprietary capacity, may decide which products to stock at its stores based on their popularity among consumers. Moreover, when the products available at a retail establishment include books, magazines, or other expressive materials, the proprietor often takes their content, and even their viewpoint, into account in deciding which ones to stock. We do not perceive petitioners to dispute that the government, as proprietor, could choose to sell *Ms.* magazine at a military exchange, in place of one of several more traditional women's magazines with higher circulations, in order to provide a diversity of viewpoints to its customers. But considerations of content and viewpoint are generally inappropriate in determining access to a public forum.[5]

(characterizing "city council action" to restrict topics of transit advertising as action "by the city in a proprietary capacity").

[5] Cf. *Arkansas Educ. Television Comm'n*, No. 96-779, slip op. 6 (recognizing that certain government actions, "by [their] nature," may "facilitate the expression of some viewpoints instead of others," such as "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, * * * a public school prescribing its curriculum," or a public broadcaster making programming decisions).

Any decision that the government's actions as the proprietor of a retail establishment are subject to "forum" analysis would have significant implications, not only for military exchanges but also for public universities, libraries, museums, and other entities that purchase expressive material to be resold, loaned, or exhibited to the public. At a minimum, therefore, the Court should not consider any extension of "forum" analysis into this area until the issue has been more fully considered by the lower federal courts.

b. Even if "forum" analysis were applicable here, military exchanges—or, as petitioners prefer (Pet. 13), their newsstands and bookstores—would be, at most, nonpublic fora where reasonable restrictions on speech are permissible. Petitioners concede (*ibid.*), as they must, that military exchanges, or certain sections of them, are not traditional public fora, as are public parks and streets. They contend (Pet. 13-14) only that the newsstands and bookstores are "designated" public fora, *i.e.*, that the government has deliberately set aside those areas for expressive activity. The court of appeals correctly concluded that petitioners failed to satisfy this Court's standard for demonstrating the existence of a designated public forum. Pet. App. 8a-13a. Such an application of settled legal principles to the particular facts of this case does not warrant further review.

This Court has repeatedly recognized that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); accord *Arkansas Educ. Television Comm'n*, No. 96-779, slip

op. 9-10 ("Designated public fora * * * are created by purposeful government action."); *International Soc'y for Krishna Consciousness*, 505 U.S. at 679-680; *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267 (1988). The Court has thus required affirmative evidence of the government's "clear intent to create a public forum," *Cornelius*, 473 U.S. at 802, such as a policy or practice of opening the property at issue "for indiscriminate use by the general public," *Perry Educ. Ass'n*, 460 U.S. at 47, or by some portion of the public. Accord *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993). It is often relevant to that analysis whether the property at issue is "separat[ed] from acknowledged public areas," which may "indicate that the separated property is a special enclave, subject to greater restriction." *International Soc'y for Krishna Consciousness*, 505 U.S. at 680.

This Court, applying the foregoing analysis, has concluded that "[m]ilitary bases generally are not public fora." *United States* v. *Albertini*, 472 U.S. 675, 686 (1985); accord *Greer*, 424 U.S. at 838 ("the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum"); *Shopco Distrib. Co.* v. *Commanding General*, 885 F.2d 167, 172 (4th Cir. 1989) (recognizing that "[a]lmost without exception, courts have concluded that military bases fall into the non-public forum category") (citing cases from other circuits). Nor are particular portions of military bases to be classified as public fora merely because they are "specifically used for the communication of information and ideas." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981) ("a bulletin board in a cafeteria at Fort Dix is * * * no more a

'public forum' than are the street corners and parking lots found not to be so at the same military base").

The same conclusion should apply to the newsstands and bookstores within military exchanges. Petitioners do not even attempt to demonstrate that Congress, or the Executive, has "intentionally open[ed]" those areas "for indiscriminate use by the general public," or by some portion of the general public that includes petitioners and their members. *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 47. Nor could they successfully do so. It cannot readily be supposed that the government would have deliberately chosen to open the shelves of military exchanges to all publishers without regard to content—including publishers whose works, for example, are demeaning to racial, ethnic, or religious minorities, or are the propaganda of unfriendly foreign governments, or are simply of no interest to the vast majority of service members. But the necessary consequence of creating a public forum is to provide access to all speakers without regard to the content of their speech. Cf. *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995) (recognizing that public fora are open to expressive activity by Ku Klux Klan).

It is also relevant that military exchanges are not generally accessible—either to the public or to vendors—which confirms that they are not public fora, but "a special enclave, subject to greater restriction." *International Soc'y for Krishna Consciousness*, 505 U.S. at 680. The general public is not permitted to enter military exchanges. Pet. App. 12a.[6] Nor do

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[6] Petitioners argue (Pet. 16-17) that the court of appeals' reliance on the fact that the public cannot gain access to

vendors enjoy any indiscriminate right of access to the shelves of military exchanges. Government purchasing officials have traditionally exercised discretion over what products are sold at military exchanges based on, *inter alia*, whether they have determined those products to be "'necessary' to the health, comfort and convenience of members of the armed forces." *Id.* at 21a.[7] Petitioners concede as much. Pet. 17 (noting that government purchasing officials have traditionally considered factors such as "consumer demand" in deciding which products are to be sold at military exchanges). "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Arkansas Educ. Television Comm'n*, No. 96-779, slip op. 11.

Petitioner's argument, at bottom, is that the government created a public forum by inaction—*i.e.*, by initially allowing individual purchasing officials to decide, without guidance from Congress, which magazines, films, and audio and video recordings to stock at military exchanges. See Pet. 17. But this Court has

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military exchanges conflicts with this Court's statements that a designated public forum may be created for use by a particular group or for a particular purpose. However, although a public forum may be designated for a limited audience, the ultimate question remains whether the government intended to create such a public forum. No such intent has been demonstrated here. To the contrary, when the government has both limited the audience of the "forum," and selected the speakers (*e.g.*, publishers) to be admitted to the "forum," a strong inference should arise that the government did not intend to create a public forum.

[7] For example, military exchanges already neither sell nor rent video recordings of films rated X or NC-17 by the motion picture industry. See C.A. J.A. 165, 177, 205.

made clear that "[t]he government does not create a public forum by inaction or by permitting limited discourse." *Cornelius*, 473 U.S. at 802.

c. Petitioners, in straining to present an issue that could attract this Court's attention, mischaracterize the decision below on the public forum issue. For example, petitioners fault the court of appeals for "focus[ing] * * * on the military's practices with regard to entire *bases*," rather than on "exchanges alone—those portions of military property that offer access to magazines, newspapers, and books." Pet. 15. But that is not what the court of appeals did. The court, after gaining perspective on the issue from the decisions of this Court and other courts rejecting public forum claims with respect to military bases (Pet. App. 10a), specifically considered, and declined, petitioners' invitation "to adopt the view that the[] 'newsstands' [in military exchanges] are public forums" (*id.* at 11a). The court based that conclusion on the history and purpose of military exchanges (*id.* at 11a-12a), on the restrictions imposed by the government on public access to military exchanges (*id.* at 12a), and on the government's policy and practice, as proprietor of military exchanges, not to "grant[] unlimited access to military exchanges" for "the merchandise of every producer, or every 'speaker' who seeks access to [their] shelves" (*id.* at 12a-13a). It is thus evident that, contrary to petitioners' assertions, the court's "forum" analysis focused on the military exchanges, and specifically their newsstands, and not on "entire bases."

Petitioners again distort the court of appeals' opinion by claiming (Pet. 15) that the opinion rested "on the misapprehension that military bases * * * cannot be designated public fora unless they have

been 'abandoned.'" The court neither articulated nor applied what petitioners characterize (Pet. 16) as an "'abandonment' test."[8] To the contrary, the court applied what this Court, and petitioners themselves (*ibid.*), recognize to be the proper analysis: whether the government "intent[ionally]," as opposed to "by inaction or by permitting limited discourse," designated an area "for use by the public as a place for expressive activity." Pet. App. 9a-10a (quoting *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 45); see also *id.* at 11a ("governmental intent is the touchstone for determining whether a public forum has been created").

Finally, while petitioners assert that the court of appeals' decision "conflicts with this Court's precedents" (Pet. 12), they do not, and cannot, cite any case in which this Court has held that the government created a designated public forum in analogous circumstances, *i.e.*, merely by operating a commercial establishment at which merchandise, including expressive material, selected by the government is resold to customers. The court of appeals' decision, in concluding that such an establishment is not a public

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[8] Indeed, the court used the term "abandoned" only twice during its discussion of the public forum issue (Pet. App. 10a, 13a)—both times in quoting this Court's statement in *Albertini*, 472 U.S. at 685-686, that military property would generally be deemed a public forum only where the government had "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression." In any event, the statement in *Albertini*, with its focus on the government's intent, is consistent with what petitioners agree to be the proper standard for determining the existence of a designated public forum.

forum, is fully consistent with the decisions of this Court.

3. The court of appeals also correctly held (Pet. App. 13a-17a) that the Act's prohibition on the government's sale or rental of "lascivious" materials does not constitute viewpoint discrimination, *i.e.*, an "effort to suppress the speaker's activity due to disagreement with the speaker's view." *Rosenberger*, 515 U.S. at 800. In order to amount to a "viewpoint" under this Court's decisions, lasciviousness would have to be "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. It is not.[9]

This Court has recognized that restrictions on "lascivious," "lewd," or "indecent" speech are not based on viewpoint. For example, in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), the Court explained that, even though obscenity is unprotected speech, a State could not prohibit "only that obscenity which includes offensive *political* messages," because such a prohibition would constitute "idea or viewpoint discrimination" in violation of the First Amendment.

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[9] Petitioners contend (Pet. 25) that they "express a particular viewpoint"—*i.e.*, that "sexuality [is] healthy and enjoyable" —that the Act "singles out * * * for suppression while permitting contrary viewpoints." But the Act, by its terms, reaches *all* lascivious magazines, films, and video and audio recordings, whatever viewpoint, if any, they may express about sexuality. And the Department of Defense has confirmed that material should not be deemed "sexually explicit," and thus prohibited under the Act, "because of any message or point of view expressed therein." Pet. App. 76a. The Act cannot be deemed viewpoint discriminatory merely because it may (assuming *arguendo* the correctness of petitioners' unproven assertions) incidentally affect more speech on one viewpoint than on another.

But the State could, consistent with the First Amendment, "choose to prohibit only that obscenity which is the most patently offensive *in its prurience* —*i.e.*, that which involves the most lascivious displays of sexual activity." *Ibid.* It was an essential premise of the Court's discussion that distinctions based on "prurience" or "lascivious[ness]" are not "idea or viewpoint discrimination." See also *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986) (punishment of public high school student for use of "offensively lewd and indecent" language in speech to students was "unrelated to any political viewpoint"); *Board of Educ.* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (removal of books from public school library because of their "pervasive vulgarity" would be permissible whereas removal of books because of their "ideas" would not); *id.* at 877-880 (removal of books could not be based on a desire to restrict access to "political ideas or social perspectives," but could be based on, *inter alia*, offensive language) (Blackmun, J., concurring); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication.").[10]

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[10] Petitioners assert (Pet. 22 n.15) that the Court's discussion of "prurient" or "lascivious" speech in *R.A.V.* is inapposite because the Court was discussing restrictions on obscenity. But the Court's underlying premise in *R.A.V.*—that a regulation of speech based on its prurience or lasciviousness is not viewpoint based—has nothing to do with whether the speech is, or is not, obscene. Petitioners also assert (Pet. 21 n.14) that the portions of *Fraser* and *Pico* cited in the text should be disregarded because those cases "involved primary public schoolchildren"—

Petitioners contend (Pet. 20) that the Act is "necessarily viewpoint-based," *not* because of its text, but because of its underlying purpose, *i.e.*, to display the military's "core values" to members of the armed services. But petitioners have pointed to no authority suggesting that the government engages in unconstitutional viewpoint discrimination where, as here, the government seeks to demonstrate its own values by declining to sell materials at its own stores that it perceives to be inconsistent with those values. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.").

Petitioners further contend (Pet. 22) that the Act should be deemed to be viewpoint discriminatory because it "targets a specific segment of the print medium." No such contention was addressed by either the majority or the dissent in the court of appeals. And the cases relied on by petitioners (Pet. 23) are not analogous to this case. Each of those cases involved a state tax that "targeted a small group of newspapers," *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987), or magazines, *id.* at 229 & n.4.[11] The Court declined to extend the holdings

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a point that not only is factually inaccurate, see *Fraser*, 478 U.S. at 677 (case involved high school students), *Pico*, 457 U.S. at 856 (case involved high school and junior high school students), but that has no bearing on the Court's distinction between viewpoint-based and vulgarity-based distinctions.

[11] See *Arkansas Writers' Project, Inc.*, 481 U.S. at 229 & n.4 (invalidating state tax that affected possibly only one, and at most three, publishers); *Minneapolis Star & Tribune Co.* v.

of those cases in *Leathers* v. *Medlock*, 499 U.S. 439, 448 (1991), concluding that a tax affecting 100 cable television systems "hardly resembles a 'penalty for a few.'" Petitioners have not demonstrated that the producers of the lascivious magazines and other materials reached by the Act constitute the sort of small and discrete group of speakers involved in the Court's earlier cases. Cf. Pet. 4 (asserting that some "219 different 'adult' magazines" are sold annually at military exchanges). Moreover, while the statutes in those cases imposed what was clearly a "penalty" on a few publishers and not on other businesses, the Act, at most, denies petitioners a special benefit (*i.e.*, the government's selection of their products for sale at military exchanges) that is enjoyed by relatively few businesses, publishers and non-publishers alike.

Petitioners err in asserting (Pet. 26) that the court of appeals' conclusion that the Act is not viewpoint discriminatory "conflicts sharply with recent decisions of at least six other Circuits." The mere fact that the government action in those cases was held to be viewpoint discriminatory, whereas the Act in this case was not, does not create a direct "conflict * * * on the same important matter" within the meaning of this Court's Rule 10(a). None of those cases involved

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Minnesota Comm'r of Revenue, 460 U.S. 575, 591 n.15 (1983) (invalidating state tax that affected 11 publishers, only a few of which incurred any substantial tax liability); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) (invalidating state tax that affected only nine publishers); see also *Leathers* v. *Medlock*, 499 U.S. 439, 444-446 (1991) (discussing narrow impact of taxes at issue in all three cases).

a statute, or other government action, that drew distinctions based on "lasciviousness."[12]

4. Petitioners argue (Pet. 28-30) that, even if the court of appeals correctly held that the Act is not a viewpoint-based regulation in a public forum, the court nonetheless erred in holding that the Act was

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[12] See *Summum* v. *Callaghan*, 130 F.3d 906, 919-920 (10th Cir. 1997) (church that was prevented from erecting religious monument in county park, while fraternal organization was allowed to erect monument espousing its views, stated claim for viewpoint discrimination); *Burnham* v. *Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (university chancellor's removal from display of photographs depicting professors with firearms constituted viewpoint discrimination against the professors' position "that the study of history necessarily involves a study of military history, including the use of military weapons"); *Gay Lesbian Bisexual Alliance* v. *Pryor*, 110 F.3d 1543, 1545 (11th Cir. 1997) (statute that prohibited universities from using public funds to "sanction, recognize, or support" any organization that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws" was viewpoint discriminatory); *Grossbaum* v. *Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 588-589 (7th Cir. 1995) (policy that permitted most seasonal displays at government building, but prohibited seasonal displays with a religious perspective, constituted viewpoint discrimination); *AIDS Action Comm.* v. *Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 10-11 (1st Cir. 1994) (transit authority's excluding "sexually explicit and/or patently offensive" condom advertisements, while permitting film advertisements that were "at least as sexually explicit and/or patently offensive," could "give[] rise to an appearance of viewpoint discrimination").

As petitioners note (Pet. 26), the Court granted certiorari to consider one of the decisions relied on by petitioners, *Finley* v. *NEA*, 100 F.3d 671 (9th Cir. 1996), cert. granted, 118 S. Ct. 554 (1997). We believe that the two cases are sufficiently different that no need exists to hold this case for disposition in light of *Finley*.

sufficiently "reasonable" to satisfy the First Amendment. Petitioners do not dispute that the court of appeals articulated, and purported to apply, the proper standard for determining the constitutionality of viewpoint-neutral regulations in a nonpublic forum: whether the regulation is "'reasonable' in light of the purpose of the forum." Pet. App. 21a (quoting *Perry Educ. Ass'n*, 460 U.S. at 49); see Pet. 28 (agreeing that this is the proper standard). They merely contend that the court of appeals did not apply that standard rigorously enough. But asserted errors involving "the misapplication of a properly stated rule of law" do not generally merit the Court's review. Sup. Ct. R. 10.

Petitioners suggest (Pet. 28-29) that the government was required to produce "evidentiary support" that the Act is reasonable. But this Court has not demanded such support for Acts of Congress reviewed for reasonableness. See, *e.g.*, *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 427-435 (1993) (upholding constitutionality of federal statute regulating commercial speech without requiring evidence that statute directly advanced government's interest by reasonable means).[13]

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[13] The cases that petitioners claim (Pet. 28-29) to have taken a "[c]ontrary" approach are not on point. The courts in those cases were concerned only with the reasonableness of particular administrative regulations, not Acts of Congress, and sought evidence to justify regulations that appeared on their face to be viewpoint discriminatory, *Tucker* v. *California*, 97 F.3d 1204, 1215 (9th Cir. 1996), or counterintuitive, *Searcey* v. *Harris*, 888 F.2d 1314, 1321-1322 (11th Cir. 1989). The courts did not indicate that evidentiary support was always necessary in order to establish the reasonableness of a government action challenged on First Amendment grounds.

Petitioners next contend (Pet. 29-30) that the Act is unreasonable because it is underinclusive—that is, because it does not restrict the government's sale of *enough* expressive materials. But underinclusiveness is not a concept to which this Court has accorded any significant force in cases involving nonpublic fora. See *Perry Educ. Ass'n*, 460 U.S. at 37 n.13 (citing *Greer*, 424 U.S. at 838 n.10). Here, as in *Kokinda*, it would be "anomalous" if the Act's allowance of some speech could constitute "evidence that it is impermissibly suppressing other speech." 497 U.S. at 733. Rather, the Act's "generous accommdation of some types of speech testifies to [Congress's] willingness to provide as broad a forum as possible, consistent with [the military] mission," *ibid.*, and thus to the reasonableness of the Act.[14]

Petitioners suggest (Pet. 30) that Congress could have employed a "non-endorsement" sign at military exchanges as a less restrictive alternative. But arguments about less restrictive alternatives are out of place in cases involving nonpublic fora. See *Cornelius*, 473 U.S. at 808 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."); accord *Kokinda*, 497 U.S. at 735-736.

Finally, the reasonableness of the Act is underscored by the fact that the choice made by Congress,

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[14] Petitioners also assert (Pet. 30) that the government's purpose of avoiding the appearance of official endorsement of lascivious publications is unreasonable, because military exchanges also sell other products, such as cigarettes and alcohol, that the military is not perceived to endorse. This, again, is an argument regarding underinclusiveness, which has little force in a case involving a nonpublic forum.

i.e., to prohibit the sale of "lascivious" material at military exchanges, is the same choice that the military itself could make if the Act did not exist or were invalidated. Petitioners did not seek, and the district court did not grant, an injunction against the government's ceasing to sell such material for *any* reason; the injunction restrained the government only from doing so "as a result of the Act." Pet. App. 67a. Accordingly, even if the Act itself were unenforceable, the Department of Defense, military commanders, or individual purchasing officials could still decline to sell "lascivious" material at military exchanges based on an independent determination that, for example, the government might otherwise be perceived as endorsing such materials.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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MISCELLANEOUS

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The government's opposition highlights why review of the decision below is critical. The government expressly acknowledges that the decision below has broad implications for speech not only in military exchanges but also in "public universities, libraries [and] museums." Opp. 14. The government also acknowledges that the rationale of the decision below would enable the government to ban speech, in all of those fora, on the basis of *content*. *Id.* at 16. Thus, this case is not simply about lawful "lascivious" speech in military exchanges. If the decision below were correct, the government tomorrow could ban the sale in numerous fora of books or magazines about racial issues, or politics, or abortion, or any other subject matter the government chose to ban. This sweeping encroachment on speech plainly warrants review, and nothing in the government's rote defense of the decision below suggests the contrary. In addition to supporting the rationale of the decision below, the government's opposition urges alternative grounds in support of that decision which, if adopted, would fundamentally alter current public forum and viewpoint discrimination analysis.

1. What little defense the government attempts of the court of appeals' public forum rationale simply highlights the confusion in public forum doctrine, the errors of the court below in applying that doctrine, and the need for this Court's review.

a. The court below and the government's opposition wrongly assert that exchange newsstands are nonpublic fora simply because they bring the government income. For example, the court below concluded that, "because military exchanges are 'engaged in commerce,' " it could divine governmental intent not to create a designated public forum. Pet. App. 12a. The relevant question, however, is not whether the government earns money. Instead, in ascertaining whether governmental property on which money is exchanged is a designated public forum or a nonpublic forum, the relevant question is whether the government operates the property—here exchange newsstands —solely for the "purpose of raising revenue or facilitating the conduct of [the government's] own internal business,"

or whether "the government acted for the purpose of benefitting the public." *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 129 (2d Cir. 1998); *Air Line Pilots Ass'n Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995). If the former, the forum is nonpublic; if the latter, it is a designated public forum. Had the court below applied the proper analysis, it would have been forced to conclude that exchange newsstands are designated public fora, because it is undisputed that the newsstands were not opened solely to raise revenue. Indeed, it is clear from the record that they are designed expressly "for the purpose of benefitting" retired and active duty military personnel and their relatives. *See* Pet. 1-5.

The manner in which exchanges historically have been operated confirms that their purpose is not solely to raise revenue. As courts have recognized, if the government makes decisions about which speech to exclude from a forum based on the potential impact of the speech on the revenue stream, that "indicates that making money is the main goal." *New York Magazine*, 136 F.3d at 130. Critically, however, if speech that creates "the possibility of clashes of opinion and controversy" historically has been allowed in a forum, that demonstrates an intent to create a designated public forum, because allowing such controversial material in a forum charged solely with raising revenue would be "inconsistent with sound commercial practice." *Id.* The government does *not* assert that it wants to ban sexually oriented material from exchanges because such material might adversely impact sales. Nor could it. The undisputed evidence shows that such material is offered in exchanges precisely because customers demand it. *See* Pet. 4-5. It is also undisputed that exchanges historically have sold material that is controversial and that might cause some patrons to shop elsewhere.

b. The court below and the government here fail to come to terms with this Court's designated forum jurisprudence in two additional respects. First, this Court has made clear that a designated public forum need not be opened to the

public at large, or for all expressive activity. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). In finding that exchange newsstands are nonpublic fora, the court below nonetheless relied on the fact that exchanges are open only to a select group. Pet. App. 12a. In its opposition, the government similarly relies on the fact that "[t]he general public is not permitted to enter military exchanges." Opp. 16. Relegated to a footnote is the government's acknowledgment that designated or limited public fora even exist. Even the footnote, without citation and in contravention of this Court's decisions, insists that, where access is limited, "a strong inference should arise that the government did not intend to create a public forum." *Id.* at 17 n.6.

The court below and the government in its opposition similarly misapprehend the nature of a *designated* public forum. The government wrongly asserts that "the necessary consequence of creating a public forum is to provide access to *all* speakers." Opp. 16 (emphasis added). It thus argues that the use of neutral criteria such as demand or shelf space to limit the number of speakers demonstrates that no designated public forum has been created. *Id.* at 17 (citing *Arkansas Educ. Television Comm'n v. Forbes*, No. 96-779, slip op. 11 (U.S. May 18, 1998)). This mirrors the decision of the court below, which found no public forum existed because there is far more material printed than "the shelves of an exchange can hold." Pet. App. 12a. But no case has suggested that a forum generally open to expressive activity within neutral boundaries set by the government—as exchange newsstands are—is not a designated public forum. Only when the government does not allow general access—whether to the public at large or to a specified group—but instead allows speakers access to its property on a case-by-case basis, is a forum nonpublic. *See Arkansas Educ.*, slip op. at 11 ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a *class* of speakers.") (emphasis

added). Indeed, under this view, no designated public forum ever could be created because, by definition, a designated public forum is opened to use only by a limited group, or for a limited purpose.

Nor does the opinion below or the government's opposition come to terms with the fact that, once it has created a designated public forum, the government cannot reverse that course by deciding to exclude material because of its content. "[I]t cannot be true that if the government excludes any category of speech from a forum . . . that forum becomes ipso facto a non-public forum . . . . This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *New York Magazine,* 136 F.3d at 129-30 (citation omitted).

c. In its opposition the government simply ignores the court of appeals' conclusion that, because the military has not " 'abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression,' " military exchanges "are nonpublic forums." Pet. App. 13a. Instead, the government resorts to misstating petitioners' position, claiming that petitioners assert mere government inaction has created designated public fora in exchange newsstands. Opp. 14-16. Indeed, the government claims that "[p]etitioners do not even attempt to demonstrate that Congress, or the Executive, has 'intentionally open[ed]' [military exchanges] 'for indiscriminate use by . . . some portion of the general public that includes petitioners and their members." *Id.* at 16 (citations omitted). That, however, is *exactly* what petitioners demonstrated. Petitioners submitted undisputed evidence that the military has intentionally opened exchanges to publishers for the dissemination of petitioners' expressive material, subject only to the satisfaction of neutral criteria such as customer demand and available shelf space. Pet. 3-5; *see also id.* at 17.

2. As its *first* defense of the decision below, the government argues that forum analysis does not apply at all in this context, an unprecedented position that heightens the need for this Court's review.

a. Recognizing that forum analysis applies "in the context of 'restrictions that the government seeks to place on the use of its property,' " Opp. 11 (quoting *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)), the government argues that public forum analysis does not apply here because the Act "does not restrict any private individual from using government property to engage in expressive activity." Opp. 12. The government does not explain, nor can it, why military exchanges are not "government property," why General Media and other publishers and distributors are not "private individuals," or why dissemination of protected speech is not "expressive activity." *Cf. United States v. Albertini*, 472 U.S. 675 (1985) (military base is government property subject to forum analysis); *Flower v. United States*, 407 U.S. 197 (1972) (same); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) (citation omitted) (distribution of protected material is protected by the First Amendment); *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) (same).

b. The government also asserts that forum analysis does not apply because, if the government makes money in a given forum, that government property ceases to be a forum at all. Opp. 12. That startling proposition is completely at odds with this Court's precedents and cases applying those precedents. Case law uniformly indicates that the fact that the government earns money in the forum is merely a factor to consider in determining which *type* of forum exists—designated or nonpublic. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 726 (1990); *New York Magazine*, 136 F.3d at 129 (applying forum analysis to advertising spaces on buses for which city charged a fee, and finding that spaces are designated public fora); *Air Line Pilots Ass'n*, 45 F.3d at 1144 (applying forum analysis to display cases in airports for which

city charged a fee, and finding that spaces are designated public fora); *see supra* at 1-2.

3. The government's defense of the court of appeals' determination that the Act does not discriminate based on viewpoint is equally flawed, and demonstrates the need for clarification of this fundamental constitutional issue. The government's cursory attempt to distinguish *en masse* the numerous federal appellate decisions that have applied this Court's recent viewpoint discrimination precedents in a manner contrary to the court below is unavailing. *See* Opp. 24 n.12. The mere fact that none of the conflicting decisions involved an express dispute about "lasciviousness" does not detract from the central inquiry they all share with this case: whether, given the broad conception of viewpoint discrimination in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), the government may discriminate against disfavored viewpoints on sexuality, religion, or other topics under the pretense of treating those viewpoints as self-contained, proscribable "subject matter." [1]

a. Following the court of appeals, *see* Pet. App. 16a-17a & n.12, the government insists that *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), permits boundless discrimination within categories of protected speech and that *Board of Education v. Pico*, 457 U.S. 853 (1982), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), provide *carte blanche* to discriminate against "lascivious" viewpoints. Reliance on these cases is misplaced for two reasons.

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[1] The government's assertion that the Act does not discriminate based on viewpoint because "the Act, by its terms, reaches *all* lascivious magazines, films, and video and audio recordings," Opp. 20 n.9, is disingenuous. The Act favors *nonlascivious* depictions and descriptions of nudity, just as the funding guidelines struck down in *Rosenberger* favored nonreligious student groups. That a burdened class of viewpoints comprises multiple, differing members does not eliminate viewpoint discrimination. *See Rosenberger*, 515 U.S. at 831 (rejecting as "an insupportable assumption" the argument that "no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints").

First, the statements on which the court below and the government rely are dicta. *R.A.V.* struck down a municipal ban on bias-motivated speech. *Pico* held that a public school library could not expunge books based on their political viewpoints. *Fraser* upheld a public school's punishment of a student for making an off-color speech. None of those cases presented anything like the question here: the constitutional viability of a broadly drawn ban on "lascivious" depictions of nudity. If the court of appeals and the government were correct about what the Court meant by the cited dicta (and, as explained *infra*, they are not), review of this case still would be important so the Court could either validate or reconsider the sweeping implications of its nonbinding remarks.

Second, as petitioners have explained, *see* Pet. 21-22 & nn.14, 15, the court of appeals' attempt to bring *R.A.V.*, *Pico*, and *Fraser* in line with this case is wholly unconvincing. The government, tracking the reasoning of the court below, *see* Pet. App. 16a & n.12, asserts that *R.A.V.* conclusively defines "lasciviousness" as "not 'idea or viewpoint discrimination,'" Opp. 21 (quoting *R.A.V.*, 505 U.S. at 388), and that the difference between the unprotected speech posited there and the protected speech at issue in this case means nothing. The argument is baffling. The *R.A.V.* dictum says a characteristic that renders a class of speech unprotected makes a fair basis for discrimination. It says nothing about whether "lasciviousness" can describe a viewpoint. Neither *R.A.V.* nor any other decision of this Court supports the Act's unfettered censorship of protected "lascivious" speech.

As for *Pico* and *Fraser*, the government asserts, without any support or rationale, that the results in those cases had nothing to do with the fact that both arose in public schools. *See* Opp. 21-22 n.10. This Court, however, has made clear that the government may ban minors' access to some sexually oriented speech that is fully protected for adults. *See Ginsberg v. New York*, 390 U.S. 629 (1968). This is because "[d]ifferent factors come into play . . . where the interest at stake is the effect of erotic expression

upon children . . . [I]mmaturity, and perhaps other considerations, impose different rules." T. Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 938-39 (1963) (*quoted in Ginsberg*, 390 U.S. at 638 n.6). These considerations have no relevance for the adult military personnel whose access to "lascivious" viewpoints the Act curtails. Cf. *Reno v. ACLU*, 117 S. Ct. 2329, 2346-47 & n.40 (1997).

b. The court of appeals held that the Act's purpose was to avoid the appearance that the military endorsed distasteful ideas and to "promote[] military honor, professionalism, proper decorum, and military 'core values.'" Pet. App. 20a & n.15. The government, apparently recognizing that this purpose reflects viewpoint-based discrimination, tries to cast the Act as *government* speech along the lines of *Rust v. Sullivan*, 500 U.S. 173 (1991), *see* Opp. 22, and thus not subject to First Amendment constraints at all. The comparison is misplaced. In *Rust*, this Court upheld a regulation that limited speech for which the government paid as part of a governmental policy initiative. *See Rust*, 500 U.S. at 198-99. Here, in contrast, Congress has burdened *private* speakers who communicate their *own* messages based on customer demand. *Cf. Rosenberger*, 515 U.S. at 833-34 (distinguishing *Rust* and holding that government "may not discriminate based on the viewpoint of private persons whose speech it facilitates").

The government's assertion that the Act does not implicate the First Amendment because it, "at most, denies petitioners a special benefit," Opp. 23, is equally unsupportable. Reselling magazines at a profit is hardly governmental largesse. In any event, this Court has held repeatedly that withdrawing a benefit carries the same weight under the First Amendment as imposing a burden. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454, 468-69 (1995).

4. Assuming (incorrectly) that exchanges are nonpublic fora and that the Act does not discriminate based on viewpoint, the government and the court below maintain

that the Act passes constitutional muster because it is "reasonable." In so doing, however, they underscore precisely why this Court should grant review.

a. The court below purported to perform a First Amendment reasonableness analysis, but it ratified the government's arguments without requiring any showing that the Act's restriction on speech is "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The government explicitly argues that it has no obligation to present *any* evidence that the Act reasonably serves the government's interests. *See* Opp. 25. The government's argument thus confirms that the court below improperly applied a mere rational basis standard, drawn from equal protection doctrine. That standard flatly contradicts the holdings of this Court and other circuits. In applying the *Cornelius* standard, this Court inquires whether the government has presented sufficient evidence to establish that the burden on speech reasonably serves the stated purpose of the forum. *See, e.g., Cornelius*, 473 U.S. at 810-11. Accordingly, appellate courts have demanded that the government present affirmative evidence of reasonableness. *See Tucker v. California Dept. of Educ,*. 97 F.3d 1204, 1211-12 (9th Cir. 1996); *Searcey v. Harris*, 888 F.2d 1314, 1321-22 (11th Cir. 1989). The government attempts to distinguish *Tucker* and *Searcey*, and thus to salvage the court of appeals' aberrant reasonableness analysis, by asserting that a different reasonableness test applies where the regulations at issue "appear[] on their face to be viewpoint discriminatory or counterintuitive." Opp. 25 n.13 (citation omitted). The government fails to explain how or why these factors should alter the test. In any event, the Act creates exactly the same suspicions as did the restrictions in *Tucker* and *Searcey*.

b. Contrary to the government's representation, petitioners are not attempting to import strict scrutiny analysis into the reasonableness inquiry. *See* Opp. 26. Rather, consistent with the analysis of this Court and other cir-

cuits, petitioners contend that the Act's gross imprecision and irrationality in serving the post-enactment asserted interest in protecting the military's image and "core values" fundamentally draws into question whether that is the actual purpose of the Act. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). As petitioners have emphasized, the Act's ban on some but not all "lascivious" depictions or descriptions of nudity actually will create the perception that the government endorses whatever content is not banned. This is not an "underinclusiveness" problem; rather, it is a problem with the post-enactment endorsement rationale. The government never suggests an answer to that problem. Nor does the government address the apparent conflict between the Fourth Circuit's reasoning in *Tucker*, 97 F.3d at 1215, and the court of appeals' determination that a perception of government endorsement of products sold in exchanges would be reasonable. The government similarly does not attempt to square the court of appeals' refusal to consider simple available alternatives to any "endorsement" problem with the decisions of the Ninth and Fourth Circuits in *Tucker*, 97 F.3d at 1216, and *Multimedia Pub. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993). Indeed, strikingly absent from the government's opposition is any articulation of how the Act's ban reasonably serves Congress' purported purpose.[2] The explanation is plain—the Act is patently unreasonable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[2] Instead, the government inexplicably chastises petitioners for not challenging DOD's authority to ban the same materials from exchanges. *See* Opp. 26-27. But the military has imposed no such ban; indeed, it played no part in the formulation or passage of the Act. Pet. 5-6. Congress imposed the ban, and that congressional action is at issue here. Were the DOD to impose such a ban, petitioners would be free to challenge the constitutionality of that action as well.

Respectfully submitted,

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